Supreme Court of the United States

OCTOBER TERM, 1926

No. 372

R. B. MORRIS, doing business as Morris & Lowther; H. M. HEWITT and LEW NUNAMAKER, Etc., et al.,

Appellants,

vs.

WM. DUBY, H. B. VAN DUZER, and W. H. MALONE, Etc.,

Appellees.

Appeal from the District Court of the United States for the District of Oregon

Brief of Appellees

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Statement

In our opinion the statement made by the plaintiffs does not fully reveal all the facts necessary to a complete understanding of the issues, and, therefore, we take the liberty to make our own statement.

The plaintiffs in this law suit have challenged the right of the State of Oregon to regulate, by legislative act, the use of the state's public highways. In order that the court may fully understand the issues we deem it necessary to relate the history or story of events and circumstances attending the controversy.

The sixty-fourth congress of the United States of America passed a statute which was approved June 11, A. D. 1916, which act was entitled "An act to provide that the United States shall aid the state in the construction of rural post roads, and for other purposes." Subsequently the sixty-fifth congress of the United States of America, by an act approved February 28, A. D. 1919, made further and additional provision for carrying out the requirements and purposes of the original and former act.

Both of the above acts appropriated and made available said funds for use in the construction of highways under a plan of cooperation between the several states. The original act contained a provision to the effect "that the secretary of agriculture is authorized to cooperate with the states, through their respective state highway departments, in the construction of rural post roads; but no money apportioned under this act to any state shall be expended therein until its legislature shall have assented to the provisions of this act, except that, until the final adjournment of the first regular session of the legislature held after the passage of this act, the assent of the governor of the state shall be sufficient. The secretary of agriculture and the state highway department of each state shall agree upon the roads to be constructed therein and the character and method of construction; provided, that all roads constructed under the provisions of this act shall be free from all tolls of all kinds."

The State of Oregon complied with the requirements of the federal act and qualified for the aid offered by the federal government. The acceptance of and qualification by the State of Oregon is found in the enactment by the Oregon state legislature of chapter 175, General Laws of Oregon, 1917, in which act the legislature, after setting out in full the federal act, said: "The State of Oregon

hereby accepts the provisions of said act and agrees to cooperate with the federal government in carrying out the provisions thereof."

Thereafter the State of Oregon further qualified and disclosed its intention to cooperate with the federal government by the enactment of subsequent acts relating to highway construction. In said act by the Oregon legislature, and in subsequent acts, the State of Oregon made provision for the necessary funds with which to meet the aid offered by the United States and the State of Oregon provided for a highway commission and gave to that commission the following instructions and authority:

> The state highway department is hereby authorized to enter into all contracts and agreements with the United States government relating to the survey, construction or improvement and maintenance of roads under the provisions of said act of congress, to submit such scheme or program of construction or improvement and maintenance as may be required by the secretary of agriculture, and do all other things necessary fully to carry out the cooperation contemplated and provided for by the said act. For the construction or improvement and maintenance of rural post roads the good faith of the state is hereby pledged to make available funds sufficient to equal the funds apportioned to the state by or under the United States government during each of the five years for which federal funds are appropriated * * *.

The state then exercised the right to regulate the use of its public highways, and in the exercise of that right provided for the licensing of motor vehicles and their use of the highway. As a part of the legislation covering the subject of highway regulation the legislature provided that no vehicle, motor vehicle, motor truck, device or thing, having a combined weight in excess of 22,000 pounds at the point of contact of the four wheels of any such vehicle

with the surface of the highway, or a combined weight of more than 17,600 pounds at the point of contact of the two wheels of any one axle of any such vehicle, shall be moved over or upon any highway of the state without the written permission of the State Highway Commission, or of the county court of the county in which the particular road is located, in the event the road be a county road.

For the purpose of further safeguarding and preserving the highways the legislature provided with respect to state highways, that whenever the highway commission shall find that any state highway, or section thereof, is being damaged by reason of being subjected to any particular kind or character of traffic, or whenever in the judgment of the highway commission it would be for the best interests of the state highway and would result in protecting said highway from undue damage, said commission may reduce the maimum weight and speed below that fixed in the statute.

Pursuant to said legislative authority the highway commission on August 28, 1925, after a careful examination and as a result of an extensive study, reached the conclusion and judgment that a section of one of the state highways was being seriously damaged by reason of the heavy traffic which was moving thereover, and, having reached such conclusion and judgment, the highway commission, under authority of said legislative act, made its order reducing the maximum weight of load permitted upon said section of said highway to 16,500 pounds.

The plaintiffs challenged the validity of the legislative act, and likewise challenged the validity of the order of the commission, and they sought a temporary restraining order and a permanent injunction against the enforcement of the order of the commission.

The plaintiffs attempted to support their challenge of the state law upon three grounds:

(1) The alleged unconstitutionality of the Oregon law.

(2) The alleged violence done by the Oregon law and by the order of the commission, to the act of congress, known as the "Federal Road Act."

(3) Repudiation of alleged contractural obligations.

The matter was presented to Honorable Wm. Gilbert, judge of the United States circuit court of appeals, for the ninth district; and the Honorable Chas. E. Wolverton and Honorable Robert S. Bean, judges of the district court of the United States for the district of Oregon, under the issues made by the plaintiffs in their original bill of complaint. An order was made by the court denying plaintiffs' application for a temporary restraining order, and the court thereafter granted defendant's motion to dismiss the bill of complaint.

The plaintiffs applied for, and were granted, the right to file an amended bill of complaint. There appears very little, if anything, in the amended complaint which materially changed the situation or made the principles of law and their application any different than prevailed under the original bill. In the amended complaint the plaintiffs sought to procure some benefit from the law applicable to interstate commerce, and for that purpose alleged that the freight which was carried by the plaintiffs in intrastate traffic ultimately acquired the characteristics and status of interstate traffic by reason of the fact that a portion of such freight, after being delivered by plaintiffs at their terminal in Portland, was picked up by carriers operating in interstate commerce.

Plaintiffs then took, and still take, the position that the State of Oregon is under contract with the federal government to maintain the public highways, regardless of the

cost, and that such highways must be maintained in such state of repair and condition as to meet the needs and requirements of the plaintiffs and others similarly engaged.

The plaintiffs contend further that the alleged contractual obligations existing between the federal government and the State of Oregon exist for the benefit of the plaintiffs, and that the State of Oregon is without right or authority to modify that contract even with the approval of the federal government.

All the issues involved were decided by the court adversely to plaintiffs, and the Oregon law and the position of the highway commission were sustained in every particular; and the plaintiffs now come to this court asking for the relief they were denied in the court below.

Argument

THE PLAINTIFFS ARE NOT ENTITLED TO INJUNCTIVE OR OTHER RELIEF AGAINST THE OREGON STATE HIGHWAY COMMISSION ON THE GROUND STATED IN THEIR COMPLAINT AND CAN NOT BE RELIEVED OF THE EFFECT AND SCOPE OF THE COMMISSION'S ORDER, for:

I

THE PARAMOUNT CONTROL OF THE PUBLIC HIGHWAYS OF THE STATE IS VESTED IN THE STATE LEGISLATURE. CONTROL IS SOMETIMES DELEGATED, BUT IS NEVER SURRENDERED.

This principle of law has been well and fully established, and is a principle recognized, we believe, in practically all of the sovereign states, and one long recognized and followed in this state. The following authorities are cited in support of this principle, subject to constitutional limitation:

> The state has absolute control over its public streets and highways, including those of its municipal and quasi-municipal corporations.
>
> 13 R. C. L., § 143.

> The improvement of the boulevard in question was a question over which the state, if it had deemed it proper to do so, could have taken immediate charge by its own agent, for it is one of the functions of government to provide public highways for the convenience and comfort of the people.
>
> *Atkin v. Kan.*, 191 U. S. 207 at 221-22.

The legislature of the state represents the public at large, and has, in the absence of special constitutional restraint and subject to the property rights and easements of the abutting owners, full and paramount authority over all public ways and public places. 2 Dillon Mun. Corp. 4 Ed., Sec. 656.

Cicero Lbr. Co. v. Cicero, 176 Ill. 9 at 21-22.

Paramount authority over streets and highways is vested in the legislature as a representative of the entire people.

Salem v. Anson, 40 Or. 339 at 343.

All roads established by legislative authority are public roads in so far as the right of the citizens to travel on them is concerned, but they do not all belong to the state. It must, however, be true that over all ways in which there is a public right there must be some legislative authority. Presumptively all roads laid out under legislative enactments are public ways belonging to the state and under full control of the legislature.

Elliott's Roads and Streets, 2 Ed., p. 8, § 9.

So it is (the legislature) has power to give jurisdiction over city streets to the municipality or to the park commission or police board, or subject to the authorities, as it deems fit. It (the legislature) also has power to divest municipalities of all control over their streets, and to change such control at its pleasure.

13 R. C. L., § 143, p. 164.

Primarily the state has paramount control over all the highways within its borders, including public streets and highways in the confines of the municipalities. Whatever authority a municipality may enjoy or possess pertaining to its streets and highways must be derived from the legis-

lative assembly through its franchise or charter. 2 Dillon Mun. Corp., 4 Ed. 680, 683; *Winter v. George*, 21 Or. 251 at 259; (27 Pac. 1041); *Simons v. Northrup*, 27 Or. 487, 501 (40 Pac. 560; 30 L. R. A. 171). Nor does the mere fact that the state has delegated certain power to the municipality inhibit it from again resuming or exercising such power; hence it is said the legislature of the state represents the public at large, and has in the absence of a special constitutional restraint and subject (according to the weight of more recent judicial opinion) to the property rights and easements of the abutting owner, full and paramount authority over all public ways and public places. 2 Dillon Mun. Corp., 4 Ed. 656. The logical cogent result of these principles is that the state, as well as the city and township to which it has previously delegated the requisite authority, may fix and establish the grades of the streets and public highways within the corporate limits of such municipalities.

Brand v. Multnomah County, 38 Or. 79, 91.

The streets of a city are not its private property, but they are for the use of the public, whose general agent is the legislative assembly, which, in the absence of any constitutional restriction, has paramount authority over such highways, including bridges thereon, and may grant the supervision and control thereof to some other governmental agency, so long as the way is not diverted to a use inconsistent with or substantially different from that which was originally designed, provided, however, that the change is not intended to impose upon one municipality a debt incurred by another.

Yocum v. City of Sheridan, 68 Or. 237.

But, if it were otherwise, the law is now too well settled to be questioned that the public highways of a city are not the private property of the municipality, but are for the use of the general public, and that, as the legislature is the representative of the public at large, it has, in the

absence of any constitutional restrictions, paramount authority over such ways, and may grant the use or supervision and control thereof to some other governmental agency so long as they are not diverted to some use substantially different from that for which they were originally intended.

Simon v. Northrup et al., 27 Or. 237.

Berry, Automobiles, 4 Ed., p. 33, § 34.

Huddy on Automibiles, p. 62, § 38.

Jas. Stephens and Wm. H. Frush v. David Powell, 1 Or. 283 at 284.

Reed v. Dunbar, 41 Or. 509, 514.

Straw v. Harris, 54 Or. 424, 432.

II

IT IS A RULE OF LAW THAT THE COURT WILL FOLLOW THE INTERPRETATION GIVEN A STATUTE BY THE STATE COURT IF IT IS NOT REPUGNANT TO THE LAWS OF THE GENERAL GOVERNMENT.

While the mere rejection of defendant's offer of proof does not strictly present a federal question, we may properly regard the exclusion of the evidence upon the ground of its incompetency or immateriality under the statute, showing what in the opinion of the state court is the scope and the meaning of the statute, taking the above observations of the state court as indicating the scope of the statute, and such is our duty. (*Leffingwell v. Warren*, 2 Black. 599, 603; *Morley v. Lakeshore R. R. Co.*, 146 U. S. 162, 167; *Tullis v. L. E. & W. R. R. Co.*, 175 U. S. 348.)

Jacobson v. Mass., 197 U. S. 11, 24.

We come then to inquire whether any right given or secured by the constitution is invaded by the statute if interpreted by the state court.

Jacobson v. Mass., 197 U. S. 11, 25.

The questions just stated are questions of local law, and in determining whether the statute violates any right secured by the federal constitution we must in the particulars named accept the interpretation put upon it by the state court. In *Tullis v. Lake Erie & Western R. R.*, 175 U. S. 348, 353, the question as to the constitutionality of the City of Indiana relating to railroads and other corporations, except municipal corporations. The supreme court of that state held that the statute was capable of severance, and that its provisions as to railroads were not so connected in substance with the provisions relating to other corporations that their validity could not be separately determined. This court, following that view, declared it to be an elementary rule that it should adopt the interpretation of the statute of a state affixed to it by a court of last resort thereof. (*Mo. Pacific Railroad Co. v. Neb.*, 164 U. S. 403, 414; *Chicago & Milwaukie R. R. Co. v. Minn.*, 134 U. S. 418, 456; *St Louis Iron Mt. & R. R. Co. v. Paul*, 173 U. S. 404, 408.)

W. W. Cargill Co. v. Minn., 180 U. S. 452, 466.

The highest court of the state has construed the section as applying to common carriers engaged exclusively in interstate commerce. (*Northern P. R. Co. v. Schoenfeldt*, 123 Wash. 579, 213 Pac. 26; *State ex rel. Schmidt v. Department of Public Works*, 123 Wash. 705, 213 Pac. 31.) The main question for decision is whether the statute, so construed and applied, is consistent with the federal constitution and the legislation of congress.

U. S. Sup. Ct. Adv. Opinions, Mch. 16, 1925, p. 301; 267 U. S. 307, 45 Sup. Ct. Rep. 324.

Buck v. Kuykendall, 69 L. Ed. 623, 625.

This court has uniformily professed its disposition, in cases depending on the laws of a particular state, to adopt the construction which the courts of the state have given to those laws. This course is founded on the principle, supposed to be universally recognized, that the judicial department of every government, where such department exists, is the appropriate organ for construing legislative acts of that government. Thus, no court in the universe which professed to be governed by principle would, we presume, undertake to say that the courts of Great Britain, or of France, or of any other nation, had misunderstood their own statutes, and therefore erect itself into a tribunal which should correct such misunderstanding. We receive the construction given by the courts of the nation as the true sense of the law, and feel ourselves no more at liberty to depart from that construction than to depart from the words of the statute. On this principle, the construction given by this court to the constitution and laws of the United States is received by all as the true construction; and, on the same principle, the construction given by the courts of the several states to the legislative acts of those states, is received as true, unless they come in conflict with the constitution, laws, or treaties of the United States. If, then, this question has been settled in Kentucky, we must suppose it to be rightly settled.

Elemendorf v. Taylor, et al., 10 Wheat. 153, 6 L. Ed. 289, 292.

For the purposes of this case, we must treat the statute, as requiring those engaged in interstate commerce to give all persons traveling in Louisiana, upon the public conveyances employed in such business, equal rights and privileges in all parts of the conveyance, without distinction or discrimination on account of race or color. Such was the construction given to that act in the courts below, and it is conclusive upon us as the construction of a state law by the state courts.

Hall v. DeCuir, 95 U. S. 485, 24 L. Ed. 547.

As remarked in *Missouri, K. & T. R. Co. v. McCann*, 174 U. S. 580, 586, 43 L. Ed. 1093, 1096, 19 Sup. Ct. Rep. 755, the contention calls on this court to disregard the interpretation given to a state statute by the court of last resort of the state, and, by an adverse construction, to decide that the state law is repugnant to the Constitution of the United States. "But the elementary rule is that this court accepts the interpretation of a statute of a state affixed to it by the court of last resort thereof."

Tullis v. Lake Erie & W. R. Co., 44 L. Ed. 192, 195; 175 U. S. 348, 20 Sup. Ct. Rep. 136.

It is well settled that in cases of this kind the interpretation placed by the highest courts of the state upon its statutes is conclusive here. We accept the construction given to a state statute by that court. (*St. Louis I. M. & S. R. Co. v. Paul*, 173 U. S. 404, 408, 43 L. Ed. 746, 19 Sup. Ct. Rep. 419; *Missouri, K. T. R. Co. v. McCann*, 174 U. S. 480, 586, 43 L. Ed. 1093, 1096, 19 Sup. Ct. Rep. 755; *Tullis v. Lake Erie & W. R. Co.*, 175 U. S. 348, 44 L. Ed. 192, 20 Sup. Ct. Rep. 136.) Nor is it material that the state court ascertains the meaning and scope of the statute, as well as its validity, by pursuing a different rule of construction from that we recognize. It may be that the views of the Kansas court in respect to this matter are not in harmony with those expressed by us in *U. S. v. Reese*, 92 U. S. 214, 23 L. Ed. 563; Trade Mark Cases (*U. S. v. Steffens*), 100 U. S. 82, 25 L. Ed. 550; *U. S. v. Harris*, 106 U. S. 629, 27 L. Ed. 219, 1 Sup. Ct. Rep. 601 and *Baldwin v. Franks*, 120 U. S. 678, 30 L. Ed. 766, 7 Sup. Ct. Rep. 656, 763. We shall not stop to consider that question nor the reconciliation of the supposed conflicting views suggested by the chief justice of the state. The power to determine the meaning of a statute carries with it the power to prescribe its extent and limitations, as well as the method by which they shall be determined.

Smiley v. Kan., 49 L. Ed. 546, 550; 196 U. S. 447, 25 Sup. Ct. Rep. 289.

The construction given to a statute of a state by the highest judicial tribune of such state is regarded as a part of the statute, and is as binding upon the court of the United States as the test. (*Leffingwell v. Warren*, 2 Black. 599, 603.) The meaning of the state statute declared by the highest court of a state is conclusive upon this court. (*Randall v. Brigham*, 7 Wall. 523, 541.)

Morley v. Lakeshore R. R. Co., 146 U. S. 162, 167.

Thus it will be seen that under the act as construed by the state court, whose construction is binding upon us * * *.

Frost v. R. R. Commission, P. 682, 684; 46 Sup. Ct. 605; Adv. Opinions, Sup. Ct. U. S., Jul. 1, 1926.

Cooley, Taxation, vol. 2, 4th Ed., p. 1094.

Adams Express Co. v. Ohio St. Auditor, 165 U. S. 194, 219.

Lamburn v. County Commissioner, 97 U. S. 181, 186.

Osborne v. Fla., 164 U. S. 650, 654.

Mich. Central R. R. Co. v. Powers, 201 U. S. 245, 291.

III

THE OREGON LEGISLATURE HAS ELECTED TO DELEGATE ITS CONTROL OVER THE PUBLIC HIGHWAYS OF THE STATE TO CERTAIN MUNICIPALITIES AND COMMISSIONS.

Provisions of chapter 295, General Laws of Oregon, 1917: Control of county highways and the streets of an incorporated town has been vested in the several county courts. Section 2: Authority of the county court over roads.

All roads shall be under the supervision of the county court wherein said road is located. Every county court within this state shall have the authority, and it shall be its duty to supervise, control and direct the laying out, opening, establishing, locating, relocating, changing, altering, straightening, working, grading, maintaining and keeping in repair, improvement and vacation of all county roads within its county, and shall prescribe the methods and manner of working, improving and repairing the same, and to legalize old roads and to restore monuments thereon; and

except as shall be expressly provided, no county roads shall be hereafter established, nor shall any such road be altered or vacated in any county in the state except by authority of the county court of the proper county. The county court shall also supervise the construction and repair of all bridges on the county roads. The power therein given may be exercised directly by the court or through some one of its members designated for that purpose, with the aid of necessary assistance. The foregoing enumeration of powers of the county court shall not be construed as a denial of power necessarily incident thereto.

Chapter 295, General Laws of Oregon, 1917.

By charter provision by general law control of city streets has been delegated to the city authorities.

By provision of 237, chapter 423, General Laws of Oregon, 1917, and by subsequent and supplementary acts, legislature has delegated control over state highways to the State Highway Commission.

Sec. 5. Said commission shall have the power to carry out the provisions of this act and its duties shall be such as are provided herein. The commission is hereby authorized to make such rules and regulations as it may deem necessary. Said commission shall have general supervision over all matters pertaining to construction of state

highways, letting of contracts therefor, and the selection of materials to be used in the construction of state highways under the authorities of this act. The commission shall also determine and adopt the general policy of the highway department in deciding questions relating to the administration of the department. Said commission shall designate, construct or cause to be constructed a system of state highways within the state of Oregon, which highways shall be designated by law and by the point of beginning and terminus thereof.

Chapter 237, General Laws of Oregon, 1917.

IV

COUPLED WITH THE DELEGATION TO THE STATE HIGHWAY COMMISSION OF CONTROL OVER STATE HIGHWAYS IS THE LEGISLATIVE DELEGATION OF THE STATE HIGHWAY SYSTEM.

The same legislative session which created our present highway commission selected and designated a system of state highways comprising approximately 4,500 miles, and charged the State Highway Commission with the improvement and maintenance of the same. This selection and designation of state highways is found in chapter 423, General Laws of Oregon, 1917.

V

THE POLICE POWER IS INHERENT IN THE SEVERAL STATES, AND THE RIGHT TO REGULATE THE PUBLIC HIGHWAYS OF A STATE IS A RIGHT THAT EXISTS UNDER THE POLICE POWER, AND, THERE-

FORE, CAN NOT BE ABRIDGED, ALIENATED OR CONTRACTED AWAY BY THE LEGISLATURE.

The police power is inherent in the several states and is left with them under the federal system of government, and may always be exercised by the state legislature. It follows that the federal government can not exercise any police powers within the several states, but can exercise such power only where the authority of congress excludes territorially all the state legislation, as, for instance, in the District of Columbia, where police power of congress is the same as that of the state legislatures within their several jurisdictions.

22 Am. & Eng. Encyclopedia of Law, p. 919, § 4.

Sec. 4. The principle that no person shall be deprived of life, liberty or property without due process of law was embodied in substance in the constitution by nearly all, if not all, of the states at the time of the adoption of the fourteenth amendment, and it has never been regarded as incompatible with the principle equally vital because essential to persons, safety and society that all property in this country is held under the implied obligation that the owners' use of it shall not be injurious to the community. *Beer & Co. v. Mass.*, 97 U. S. 25 at 32; *Commonwealth v. Alger*, 7 Cush. 53, 89; *Patterson v. Ky.*, 97 U. S. 501, 505. It has, nevertheless, with marked distinctness and uniformity recognized the necessity growing out of the fundamental condition of civil society to uphold state police regulations which were enacted in good faith and had appropriate and direct connection with that protection to life, health and property which each state owes to her citizens. (The above is a quotation from *Fertilizing Co. v. Hyde Park*, 97 U. S. 659 at 667.)

Mugler v. Kan., 123 U. S. 623 at 665.

We can not doubt that the police power of the state was applicable and adequate to give an effectual remedy. That power belonged to the state when the federal constitution was adopted. They did not surrender it, and they all have it now. It extends to the entire property and business within their local jurisdiction, and both are subject to it. In all proper cases it rests on the fundamental principle that every one shall so use his own property as not to wrong or injure others. To regulate and abate nuisances is one of its ordinary functions.

Mugler v. Kan., 123 U. S. 623 at 667.

By the tenth amendment powers not delegated to the United States by the constitution, nor prohibited to the states, are reserved to the states respectively or to the people.

Among the powers thus reserved to the several states is what is commonly called "police power"—that inherent and necessary power essential to the general existence of civil society and the safeguard of the inhabitants of the state against death, disease, poverty and crime.

"The police power belongs to the states by virtue of their general sovereignty," said Mr. Justice Story during the judgment of his court. "It extends over all subjects within the territorial limits of the state, and has never been conceded to the United States." *Prigg v. Pa.*, 16 Pet. 539, 645.

Leisy v. Hardin, 135 U. S. 100 at 127.

Special licenses and permits to occupy highways for uses other than those strictly pertaining to the primary object of their establishment are always subject to the police power, and this rule holds as to the subsurface as well as the surface. Hence, a vault constructed under a street by an abutting owner may be appropriated by a municipality at any time public necessities require, although the vault was constructed with its consent. And a town or city can not give a vested right to maintain a private drain

in a highway, so that a subsequent cutting off of the drain by an extension of a system of sewers will create any liability against the municipality. Rights in streets or highways granted to public service corporations are at all times held in subordination to the superior rights of the public and all necessary and reasonable police ordinances, notwithstanding they may interfere with legal franchise rights. The grantee takes them subject to the paramount right of the municipality to grade and improve its streets, and to make such requirements and regulations as are necessary and reasonable in order to make the streets suitable and convenient for the use of the traveling public, and will be required to make such changes in its appliances as are rendered necessary thereby at its own expense. The police power can not be surrendered, so that the franchises of private corporations must be conclusively presumed to be acquired with reference to its existence, and contract rights must yield to the proper burdens imposed by growth and development. This extensive power, however, or regulation is not to be exercised at mere whim or caprice, but should be appropriate to and commensurate with the public necessity for the protection and promotion of public morals, health, safety, necessity, or convenience. Nor can its application be extended by the authority which is intrusted with such application to an arbitrary misuse of private rights, and any such unwarranted exercise of authority is unconstitutional and void.

13 R. C. L., pp. 177, 178, 179.

All agree that the legislature can not bargain away the police powers of the state; irrevocable grants or property and franchises may be made if they do not impair the supreme authority to make laws for the right government of the state, but no legislature can curtail the power of its successors to make such laws as they may deem proper in the matter of police. *Boyd v. Allen*, 94 U. S. 645.

Stone v. State of Mississippi, 101 U. S. 814, 25 U. S. Sup. Ct. Rep. 1079.

It is established by repeated decisions of this court that neither of these provisions of the federal constitution has the effect of over-riding the power of the state to establish all regulation reasonably necessary to secure good health, safety or general welfare of a community; that this power can neither be abdicated nor bargained away, and is inalienable even by explicit grant, and that all contracts and property rights are held subject to its fair exercise. *Atlantic Coast Land Co. v. Goldsboro*, 232 U. S. 548 at 558; 34 Sup. Ct. Rep. 364.

Chicago & Alton R. R. Co. v. Henry A. Tranbarger; 35 Sup. Ct. Rep. 678, 682; 238 U. S. 667.

Upon reason and authority the matter of regulating the amount of loads to be hauled over the public highways is generally recognized as properly within the discretion of the authorities charged by the law with the care and maintenance of the highway, and it is likewise settled that when any such regulation within the scope of the authority of the law-making power has been passed, the prima facie presumption is that the regulation is reasonable and proper, and in order to warrant the court in coming to a definite conclusion there must be evidence introduced showing that in the particular case the discretion granted to the legislative body has been abused and the rights of the individuals taken from them.

Standard Oil Co. v. Commonwealth, 109 S. E. 316 at 320.

Cooley on Constitutional Law, p. 542 (in notes).
Transportation Co. v. Chicago, 99 U. S. 635, 642.
Slaughter House Case, 16 Wall, 36 at 62.
Fertilizing Co. v. Hyde Park, 97 U. S. 659, 669.
Phelan v. Va., 8 How. 163 at 168.
Stone v. Miss., 101 U. S. 814.
Patterson v. Kentucky, 97 U. S. 501 at 503.
Gibbons v. Ogden, 9 Wheat. 31.
Police Power, Supra Brief, p. 7.

VI

THE AUTHORITY AND JURISDICTION WHICH A LEGISLATURE MAY EXERCISE UNDER ITS POLICE POWER IT MAY ALSO DELEGATE, WHICH IT HAS ELECTED TO DO IN THIS INSTANCE.

Section 36, General Laws of Oregon, 1921, p. 733. The streets of a municipality, or public highways of the state, and the power of the legislature to supervise, regulate, and control the use thereof is paramount, but the legislature may delegate that supervision, control and regulation to a municipality in respect to the public streets within its limits, or it may clothe some other governmental agency with that authority so long as its streets are not diverted to something substantially different from that for which they were originally intended.

Dent v. Oregon City, 106, Or. 126.

The police power of the state may be in the absence of any constitutional restriction upon the subject, delegated to the various municipalities throughout the state to be exercised by them within their corporate limits.

22 Am. & Eng. Encyclopedia of Law, 1919, § 4, subsec. 2.

In the present case, as has already been seen, the legislature authorized the city council to empower the board of police to make rules and regulations, and a majority of the court is of the opinion that there are no constitutional objections to this delegation of authority.

Commonwealth v. Plasted, 148 Mass. 375 at 383.

Such a statute is clearly within the legislative province to enact, for it is with reference to such matters as the public highways of the state over which the legislature

has a primary power as to the laying and vacating thereof. *Chicago & N. W. R. Co. v. R. R. Commissioner*, 168 Wis. 185, 191; *Krueger v. Wis. Telephone Co.*, 16 Wis. 96, 104; 37 Cyc. 45; 13 R. C. L. 163. It is a power which it may delegate to some appropriate administrative body. Nevertheless it is still an exercise of such power by the state itself.

Madison v. Fuller & Johnson Mfg. Co., 176 Wis. 462, 469.

Under the provisions of chapter 10, municipalities are given the power to regulate and control traffic upon their streets which begins, ends and is completed within their corporate limits, but as to the transportation for hire of passengers or property by motor vehicles not exclusively and wholly conducted within the corporate limits of a city or town the power to regulate it is conferred exclusively upon the public service commission of the state, and no power, whether previously conferred by charter or legislative enactment, remains in the cities or towns except the mere power to pass or enforce some purely regulatory ordinance which in no wise conflicts or interferes with the regulation of the traffic, by the public service commission.

Parker v. City of Silverton, et al., 109 Or. 303.

Jacobsen v. Mass., 197 U. S. 11, 25.

VII

THE ORDER MADE BY THE HIGHWAY COMMISSION REDUCING THE LOAD LIMIT IS A REASONABLE EXERCISE OF THE POLICE POWER.

In determining what is a reasonable exercise of the police power the court, we believe, will be guided in a large measure by the purpose of the law and the object of the

order. Courts are slow to overthrow those measures which have for their end the promotion of the general good and the convenience of the general welfare and prosperity.

> In answer to that question we must be cautious about pressing the broad words of the fourteenth amendment to a direly logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown easily enough to transgress the scholastic interpretation of one or the other of the great guarantees in the bill of rights. They more or less limit the liberty of the individual or diminish property to a certain extent. We have few uniformly certain criteria of legislation, and as it often is difficult to draw the line where what is called the police power of the state is limited by the constitution of the United States judges should be slow to read into the latter (nolamus mutare) as against the law-making power. In the first place it is established by a series of cases as an ulterior public advantage may justify a comparatively insignificant taking of private property for what in its immediate purpose is of private use. *Clark v. Nash*, 198 U. S. 361; 49 L. Ed. 1085; *Strickley v. Hyland Bay Gold Mine III Co.*, 200 U. S. 527, 531. And in the next it would seem that there may be other cases besides the everyday one of decisions in which the share of each party in the benefit of the scheme of mutual protection is sufficient compensation for the correlative burden it is compelled to assume. *Ohio Oil Co. v. Ind.*, 177 U. S. 190.
>
> It may be said in a general way that the police powers extend to all great public needs. *Clanfield v. U. S.*, 167 U. S. 518.
>
> *Noble State Bank v. Haskell*, 219 U. S. 104, 31 Sup. Ct. Rep. 186, 187, 188.

The right to exercise the police power is a continuing one, and may be exercised so as to meet the ever changing conditions and necessities of the public. Those who make investments for this purpose, as the plaintiff, do so and hold their property and their rights to use it subject to

such other and different burdens as the legislature may reasonably enforce for the safety, welfare and convenience of the public. The state legislature may regulate the use by automobiles and motor cars of the highways of the state. *Hendrick v. Maryland*, 235 U. S. 610 at 635. It may also authorize municipalities to regulate the use of the streets by vehicles, and may exclude vehicular traffic. *Barnes v. Essex Co. Park Com.*, 86 N. J. Law 141; 91 Atl. 1019.

Lane v. Whitaker, 275 Fed. 476, 479.

And it is also settled that the police power implies regulation designed to promote the public convenience or the general welfare and prosperity, as well as those in the interest of the public health, morals and safety. *Lakeshore, Mich. Southern M. S. R. Co. v. Ohio.* 173 U. S. 285, 292; Sup. Ct. Rep. 465; *Chicago B. & Q. R. Co. v. Ill.*, 200 U. S. 561, 592; *Bacon v. Walker*, 204 U. S. 311, 317; 27 Sup. Ct. Rep. 287.

Chicago & Alton R. R. Co. v. Henry A. Tranbarger, 238 U. S. 67; 35 Sup. Ct. Rep. 678, 682.

The power and authority of the highway commission to superintend, construct, and maintain state highways includes the authority to preserve from destruction or deterioration, and, if this be so, the authority also to forestall and prevent encroachment thereon by any person or corporation that would prove deleterious to such highways or detrimental to the use thereof by the general public. I think this follows from the general power and authority accorded the highway commission. However, as the right and privileges are granted to public service corporations to construct, maintain, and operate telegraph and telephone lines along the public roads of the state, the highway commission can not so exercise its authority as to deny arbitrarily such corporations that right or privilege; but it does possess the power and authority of

reasonable regulation as to these lines—that is, as to the manner of their construction and the place of location as they may affect the highways and their use by the public * * *.

So it is that the highway commission may exercise this power of regulation, within reasonable bounds, to conserve both the service utilities and the public welfare, and such utilities must submit to its designation of the place of locating their lines and the manner of their construction, so long as the acts of the commission in this respect are not a denial of their right to construct and maintain along the highway, and are not tantamount to an arbitrary exercise of its power and authority in the premises.

Postal Telegraph Co. v. State Highway Commission, 276 Federal Reporter 962.

Noble State Bank v. Haskell, 219 U. S. 104.

C. B. & Q. v. McGuire, 219 U. S. 549; 31 Sup. Ct. Rep. 259, 263.

Crowley v. Christensen, 137 U. S. 86.

Jacobsen v. Mass., 197 U. S. 11, 24, 25, 26, 27, 35.

McClean v. Ark., 167 U. S. 547, 548.

State ex rel. Bonsteel v. Allen, 83 Fla. 214, 217, 218, 228.

State v. Mays, 26 L. R. A. N. S. 506.

13 R. C. L., § 212, p. 256, 257.

The foregoing principles of law show that the power delegated to the State Highway Commission was a power that rested with state legislature, and that it might delegate and the commission exercise. Therefore, since there are no facts diverting these principles the injunction was well refused.

VIII

IT WAS NOT NECESSARY AND THE PLAINTIFFS CAN NOT ASSERT OR SHOW ANY RIGHT TO BE HEARD AS A CONDITION PRECEDENT TO THE MAKING OF THE ORDER NOW CHALLENGED:

The statute which authorizes the highway commission to limit the weight of loads upon state highways provides that whenever the commission shall find that it will be for the best interests of the state, and will protect from undue damage any highway or section of any highway, it may make an order reducing the weight of loads allowed upon such highway or section thereof. There is no provision in the statute requiring a hearing or requiring that notice be given to any member of the public using the highway. The statute simply provides that when the commission shall find certain conditions it may make the order. Plaintiffs have attached to their complaint a copy of the order from which it can be ascertained that the conditions set out in the statute were complied with by the commission. Plaintiffs can not be heard to read into the statute conditions not placed there by the legislature.

The only requisite is that the order be authorized by law and that it be reasonable:

> Municipal regulation against carrying on any vehicle in any street a load of more than three tons was held a reasonable exercise of power in *Com. v. Mulhall*, 162 Mass. 496, 44 Am. St. Rep. 387, 39 N. E. 183, under legislative authority to make such rules and regulations for the passage of vehicles as were necessary for public safety or convenience.
>
> A city charter granting full power to make rules and ordinances respecting streets, carriages, wagons, etc., and in general every other regulation appearing requisite and

necessary, authorizes an ordinance limiting the weight which vehicles shall carry through the streets. *Nagle v. Augusta*, 5 Ga. 546.

The authority of a municipality to adopt an ordinance limiting heavy vehicles to one side of a street is conferred by a statute authorizing ordinances for the regulation of all vehicles used therein, by establishing the rates of fare, routes, and places of standing, and in any other respect. *State v. Boardman*, 93 Me. 73, 46 L. R. A. 750, 44 Atl. 118.

The enactment of a city ordinance prohibiting the drawing of loads in excess of a certain weight over paved streets, except in wagons having tires of a certain width, is a reasonable exercise of a charter power granting the right to lay out streets, pave and repair them, and exercise general supervision over them, and to enact ordinances to carry out those objects. *People v. Wilson*, 41 N. Y. S. R. 765, 16 N. Y. Supp. 583.

State v. Bussian, 31 L. R. A. (N. S.) 685, and notes.

In *People, Branson v. Walsh*, 96 Ill. 232, 36 Am. Rep. 135, the case of *People v. Kerr*, 27 N. Y. 188, was referred to with approval, and the following quotation was made therefrom: "So far as the existing public rights in these streets are concerned, such as the right of passage and travel over them as common highways a little reflection will show that the legislature has supreme control over them. When no private interests are involved or invaded, the legislature may close a highway, and relinquish altogether its use by the public, or it may regulate such use, or restrict it to peculiar vehicles, or to the use of particular motive power. It may change one kind of use into another, so long as the property continues devoted to public use. What belongs to the public may be controlled and disposed of in any way which the public agent sees fit." *Cicero Lumber Co. v. Cicero*. 42 L. R. A. 703.

It is an equal right of all to use the public streets for purposes of travel by proper means, and with due regard for the corresponding rights of others; and it is also too

well recognized in judicial decisions to be questioned that an automobile is a legitimate means of conveyance on the public highways. But the right to so use the public streets, as well as all personal and property rights, is not an absolute and unqualified right. It is subject to be limited and controlled by the sovereign authority—the state—whenever necessary to provide for and promote the safety, peace, health, morals, and general welfare of the people. To secure these and kindred benefits is the purpose of organized government, and to that end may the power of the state, called its police power, be used. By the exercise of that power through legislative enactments, individuals may be subjected to restraints, and the enjoyment of personal and property rights may be limited, or even prevented, if manifestly necessary to develop the resources of the state, improve its industrial conditions and secure and advance the safety, comfort, and prosperity of its people.

And it is fundamental law that no constitutional guaranty is violated by such an exercise of the police power of the state, when manifestly necessary, and tending to secure such general and public benefits. Citing many cases.

That reasonable regulations for the safety of the people while using the public streets are clearly within this police power of the state is too plain to admit of discussion. Such is and has been the law everywhere.

Since the introduction of automobiles as vehicles of conveyance, many cases have arisen, and been decided by the courts of last resort, in different states, respecting the validity and construction of statutes and ordinances regulating their use upon the public highways, and it has been uniformly held that the state, in the exercise of its police power, may regulate their speed, and provide other reasonable rules and restrictions as to their use.

State v. Mayo, 26 L. R. S. (N. S.) 506.

A statute may require slow-moving vehicles to keep to the right side of the streets at points where traffic is large or the streets are usually congested, and it is no defense that at the time of its violation the defendant was

not in fact blocking the traffic. So ordinances requiring heavy vehicles to use one side of a street only are generally upheld if reasonable. Such an ordinance does not deprive a person of any right but simply regulates the exercise of it, and its effect may be to afford to all travelers much better opportunities for travel than they could otherwise enjoy. That portion of the street so designated must be reasonably suited, for the purpose, however, and if it is not so suited, or is absolutely impassable, then the ordinance is unreasonable and can not be enforced. Statutes, requiring vehicles carrying loads of a certain weight to be furnished with tires of a certain width are generally held to be valid, and municipal ordinances to the same effect are also generally upheld if reasonable and within the charter powers of the municipality, as are ordinances limiting the weight which vehicles may carry through the streets. It has been held, however, that an express grant of power to regulate by ordinance the width of the tires of all vehicles for "heavy transportation," impliedly excludes the power to regulate the width of tires on all vehicles for transportation irrespective of the character of the transportation, although such power might otherwise have been implied from the general power to improve and regulate the use of streets. A statutory provision conferring upon a municipal corporation authority to care for, supervise, and control all public highways, streets, bridges, etc., empowers a city to enact an ordinance requiring vehicles passing over bridges to keep on the right-hand side, and forbidding one vehicle to pass another on any bridge. And an ordinance requiring drivers of vehicles to keep to the right of the center of the street, and, when turning to the left to enter an intersecting street, to turn only after passing the center of such intersecting streets, has been held to be a proper exercise of the police power. So ordinances requiring vehicles to carry lights at night are generally held to be valid. But the power conferred on municipal corporations to regulate the movement of teams and vehicles does not warrant the total prohibition of such traffic generally in certain parts of a city street.

13 R. C. L., § 212, pp. 256, 257.

The public highways of the state are built and maintained by public funds derived from various sources of taxation. Their construction and maintenance are a charge upon the people of the state, and it is not only the right, but the duty, of the state, to prohibit their use by motor vehicles, that by reason of their great weight or other reasons, are likely to impair and seriously injure the roads. In the exercise of this power the regulations and prohibitions must be just and reasonable, and not such as would impair the reasonable use of the highways by the public. We find, therefore, that the prohibition of the use on the public highways outside of municipalities, of motor vehicles of certain weights enumerated in article 5 of the act amending section 1011, Revised General Statutes, is not unreasonable when considered in connection with the character of our existing public highways.

State ex rel. Bonsteel v. Allen, 26 A. L. R. 738.

Notice to a party where rights are to be affected by judicial proceedings is an essential element of due process. But in the exercise of legislative function notice is not essential, as where one is affected by exercise of police power.

12 Corpus Juris, p. 1228, § 1006.

Of course, the courts are open to appellant to challenge the validity of the ordinance, as in attempting to exercise the police power, but if the act was one of legislative character and was not judicial, the appellant was not entitled to a hearing on the question of whether the ordinance should be passed.

Pittsburg, Cincinatti & St. Louis R. R. Co. v. City of Hartford, 170 Ind., 674, 680.

It is quite certain, however, that so far as sidewalk assessments are concerned it has been strictly held that a provision for notice to the property owner before the construction or repair of the sidewalk is not essential to the validity of the law. *Hennessy v. Douglas Co.*, 99 Wis. 629; 74 N. W. 983.

Lake Avenue L. Co. v. Lake, 134 Wis. 470, 475.

The legislature has power, and has exercised it in countless instances, to enact general laws upon the subject of general health and safety without providing that the people who are to be affected by these laws shall first be heard before they take effect in a particular case. The fact that the legislature has chosen to delegate a certain portion of its power to a board of health would not alter the principle, nor would it be necessary to provide that the board should give notice and afford a hearing to the owner before it made such order. Laws and regulations of the police nature are not unconstiutional. Although no provision is made for such a disturbance, they do not appropriate private property for public use, but simply regulate its use and enjoyment by the owner. If he suffers injury to his health it is (damnum asbque injura) or, in theory of the law, he is compensated for it in sharing in the general benefits which the regulations are intended and calculated to secure.

So in the present case, while no notice may have been given the railroad company of the pendency of the ordinance, and while they may not have been invited to participate in the proposed legislation, yet they had an opportunity to and did in fact put in issue by the answer both the validity of the ordinance and the reasonableness of the amount appropriated to them respectively for the repair of the viaduct in question. The validity of the statute and of the ordinance having been passed upon and upheld by the courts of the state, it is not the function of this court apart from the provision of the federal constitu-

tion supposed to be involved, to declare state enactments void because they may seem doubtful in policy and may inflict a hardship in the particular instance.

Chicago R. R. Co. v. Neb. 170 U. S. 67, 76, 77.

Butterfield v. Stranahan, 192 U. S. 470, 497.

Control of Georgia R. Co. v. Railroad Commission of Alabama, 209 Fed. 75, 78.

(*People ex rel. v. Board of Health*, 140 N. 1, 6.)

The legislature has power, and has exercised it in countless instances, to enact general laws upon the subject of the public health and safety, without providing that the parties affected by the laws shall first be heard before they shall take effect in any particular case. * * * The fact that the legislature has chosen to delegate a certain portion of its power to the board of health, and to enact that the owners of certain tenement houses should be compelled to furnish water after the board of health so directed, would not alter the principle; nor would it be necessary to provide that the board should give notice and afford a hearing to the owner before it made such order.

Health Department v. Rector, etc., 145 N. Y. 32, 40, 42.

State v. McGuire, 109 Minn. 88, 92.

Goodrich v. Detroit, 184 U. S. 432, 437.

22 Sup. Ct. Rep. 397.

IX

THE ORDER DOES NOT INFRINGE UPON THE CONSTITUTIONAL RIGHTS OF THE DEFENDANT AS PROVIDED BY THE FOURTEENTH AMENDMENT.

The public highways of the state are constructed and maintained at public expense in taxation and enforced personal labor, and the privilege of using them may be conditioned upon the observance of prescribed regulations for the conservation of the highway and the public safety and comfort, and upon payment of private or licensed taxes upon vehicles; the matter of extent of the regulation and taxes to be within the legislative discretion, provided no unjust or arbitrary discriminations are imposed in the statutory regulation or legislation and due process of law is observed in enforcing the enactment. *Hendrick v. State of Maryland*, 235 U. S. 610; *Kane v. N. J.*, 242 U. S. 160; 37 Sup. Ct. Rep. 30.

All property is acquired and held and used subject to the proper assertion of lawful governmental power. The acquisition of heavy-weight motor vehicles can not prevent the proper exercise of police power of the state to conserve the public highways by limiting the weight of such vehicles as may be in operation on the public roads, even though some heavy-weight vehicles previously used on the highways were not excluded therefrom by the statutory regulation. The organic provision securing private rights does not preclude reasonable regulation of the use of private property to preserve the public highways and to preserve the public safety and welfare, even if such regulation renders less valuable or curtails the use of the property already acquired, the public safety and necessity being superior to private property rights.

State ex rel. Bonsteel v. Allen, 83 Fla. 214, 228, 229.

The ordinance does not amount to a taking of property without just compensation, the regulation being a just exercise of police power. Appellant must submit to the requirements, even though it may be some expense or inconvenience upon him. There is too large a body of legislative regulations of this character which have received judicial sanction of the highest courts to make the proposition a debatable one.

Pittsburgh & R. Co. v. City of Hartford, 170 Ind. 674, 680.

And it is well settled that the enforcement of uncompensated obedience to a legitimate regulation established under the police powers is not the taking of property without compensation or without due process of law in the sense of the fourteenth amendment. *Chicago B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 255; 17 Sup. Ct. Rep. 581; *New Orleans Gas & Light Co. v. Drainage Commission*, 197 U. S. 453, 462; 25 Sup. Ct. Rep. 471; *Chicago B. & Q. R. Co. v. Ill.*, 200 U. S. 561, 591.

Chicago & Alton R. R. Co. v. Henry A. Tranbarger, 238 U. S. 67; 35 Sup. Ct. Rep. 678, 682.

Every right, from absoluted ownership in property down to a mere easement, is purchased and holden subject to the restrictions that it shall be so exercised as not to injure others. Although at the time it be remote and inoffensive, the purchaser is bound to know of its peril that it may become otherwise by the residence of many people in its vicinity, and that it must yield to bylaws and other regular limitations for the suppression of nuisances.

Fertilizing Co. v. Hyde Park, 97 U. S. 659, 668.

> The fourteenth amendment to the constitution of the United States does not destroy the power of the state to enact police regulations as to the subjects within their control, *Barber v. Connolly*, 113 U. S. 73, 31; *Minneapolis & St. Louis Ry. Co. v. Beckwith*, 129 U. S. 26, 29; *Giozza v. Tiernan*, 148 U. S. 657; *Jones v. Brim*, 165 U. S. 180, 182; and does not have the effect of creating a particular and personal right in the citizen to use public property in defiance of the constitution and laws of the state.
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> *Patterson v. Kentucky*, 97 U. S. 501, 505.

The defendant claims that he has made investment in reliance upon the former regulation, but as pointed out in *Lane v. Whitaker*, 275 Fed. 476, 479, supra, section VI of brief, such investments are made subject to other regulations that legislature may reasonably enforce for public safety, welfare and convenience.

Furthermore, the facts of this case demonstrate that the order made by the commission preserves the very foundation of plaintiff's business and instead of encroaching upon his property rights it defends them against his own attack, for without good roads he is helpless. This is a common result of the exercise of police powers, as pointed out in *Ohio Oil Co. v. Indiana*, 177 U. S. 190, 210, where the court says: "Viewed, then, as a statute to protect or to prevent the waste of the common property of the surface owners, the law of the state of Indiana which is here attacked because it is asserted that it divested private property without due compensation, in substance, is a statute protecting private property, and preventing it from being taken by one of the common owners without regard to the enjoyment of others," * * *. In short this order protects others interested in interstate commerce, it protects the plaintiff's interest and thereby furthers interstate commerce, the purpose of the general government in the act of 1917.

X

WHETHER THIS BE A CONTRACT FOR THE DEFENDANT'S BENEFIT OR A LAW UPON WHICH HE MAY REPOSE — IN EITHER EVENT HE IS SUBJECT TO REASONABLE REGULATION, THIS BEING AN EXERCISE OF POLICE POWER.

The power being essential to the maintenance of the authority of local government to the safety and welfare of the people is inalienable. As was said by Chief Justice Waite, referring to earlier decisions to the same effect: "No legislature can bargain away the public health and the public morals. The people themselves can not do it—much less their servants. The supervision of both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies the moment may require. Government is organized with a view to their preservation, and can not divest itself of the power to provide for them. For this purpose the largest legislative discretion is allowed, and this discretion can not be parted with any more than the power itself." See *Butchers Union Co. v. Crescent City Co.* 111, U. S. 746, 743.

Stone v. Miss., 101 U. S. 814, 819.

The principle involved in these decisions is that where the legislative act is arbitrary and has no reasonable relation to a purpose which it is competent for a government to effect, a legislature transcends the limits of its powers in interfering with the liberty of the contact, but where there is a reasonable relation to an object within the govermental authority the exercise of the legislative discretion is not subject to judicial review. The scope of the judicial inquiry in deciding the question of power is not to be confused with the scope of legislative consideration in dealing with the matter of policy. Whether the enact-

ment is wise or unwise; whether it is based on sound economic theory; whether it is the best means to achieve the desired result; whether in short the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance.

Chicago B. & Q. R. Co. v. McGuire, 31 Sup. Ct. Rep. 259, 263.

Congress is given power to promote the progress of science and the useful arts. To that end it may by all necessary and proper laws secure to inventors for limited times exclusive rights to their inventions. The power has been exercised in various statutes prescribing the terms and conditions upon which the letters patent may be obtained. It is true that letters patent, pursuing the words of the statute, do in terms grant to the inventor, his heirs and assigns, exclusive right to make, use and vend to others his invention or discovery throughout the United States and territories thereof, but obviously this right is not granted or effected without reference to the general powers which the several states of the union unquestionably possess over their purely domestic affairs, whether of international commerce or of police. "In the American constitutional system," says Cooley, "the power to establish the ordinary regulations of police has been left with the individual states, and can not be assumed by the national government." Cooley Const. Lim. 574. While it is confessedly difficult to mark precise boundaries of the powers or to indicate by any general rule the exact limitations which the state must observe in its exercise, the existence of such a power in the state has been uniformly recognized in this court. *Gibbons v. Ogden*, 9 Wheat. 1; *Gillman v. Philadelphia*, 3 Wall. 713; *Henderson et al. v. The Mayor of the City of N. Y.*, 92 U. S. 259; *Beer Co. v. Mass.*, supra, p. 25. It is impressed in what Mr. Chief Justice Marshall in *Gibbons v. Ogden* calls "that immense mass of legislation which can be most advanta-

geously exercised by the states and over which the national authorities can not assume supervision or control." "If the power only extends to a just regulation of rights, with a view to the due protection and enjoyment of all, and does not deprive any one of that which is justly and properly his own, it is obvious that its possession by the state and its exercise by the regulation of the property and actions of its citizens can not well constitute an invasion of the national jurisdiction or afford a basis for an appeal to the proctection of the national authorities." Cooley Const. Lim., 574.

It was held by Chief Justice Shaw to be a settled principle growing out of the nature of well ordered society that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. *Commonwealth v. Alger*, 7 Cush. 53. In recognition of this fundamental principle we have frequently decided that the police power of the state was not surrendered when the constitution conferred upon congress the general power to regulate commerce with foreign nations and between states; hence, the states may by police regulation protect their people against the introduction within their respective limits of infected merchandise. "A bale of goods upon which the duties have or have not been paid, laden with infection, may be seized to the health laws, and, if it can not be purged of its poison, may be committed to the flames."

Patterson v. Kentucky, 97 U. S. 501, 503, 505.

Davis v. Mass., 167 U. S. 43, 47, 48.
New Orleans Gas Co. v. La. Light Co., 115 U. S. 650, 672.
New Orleans v. Huston, 119 U. S. 265, 275.
Patterson v. Ky., 97 U. S. 501, 503, 505.
Holder v. Hardy, 169 U. S. 628, 631.
18 Sup. Ct. Rep., 383, 388.

XI

THE FEDERAL GOVERNMENT HAS ENGAGED IN THE CONSTRUCTION OF PERMANENT HIGHWAYS TO AID THE STATE IN ROAD CONSTRUCTION AND THE ESTABLISHING OF POST ROADS.

By an act of congress, July 11, 1916, clause 241, 39 Stat. 355, as amended February 28, 1919, c. 6940, Stat. 1189, 1200, and the federal act of November 9, 1921, c. 119, 42 Stat. 212.

The act itself is an expression of the fundamental principle of our government. Namely, a cooperation of all departments and divisions of government for the common good. The federal government extends aid to the state and the state constructs roads for the use of interstate commerce. Thus both function together in a manner that enables them to realize results that they could not realize by separate action. So we see the act is not an act to deprive either department of government of former power, but to add strength to the functioning of both.

With this in mind we look to past constructions, but upon like statutes.

> While undoubtedly they are post roads under the United States statute of March 1, 1884, C. 9, enacting that "all public roads and highways, while kept up and maintained as such are hereby declared to be post routes," and whoever knowingly and willfully obstructs or retards the passage of the mail, or any carriage, horse, driver or carrier * * *" is upon conviction subject to fine or imprisonment, or both, by U. S. Rev. Sts. § 10371, U. S. St. of 1909, C. 321, § 201.
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> Compiled Statutes, 196, § 10371.

Yet the ways remain public ways laid out and maintained by the commonwealth which has the exclusive power, not only of alteration and of discontinuance, but to make and enforce reasonable regulations for their use. The facilities hereby afforded for transportation of the mails confer no extraordinary rights upon mail carriers to use the ways as they please, nor do they necessarily or impliedly do away with the power of supervision and control inherent in the state. *Commonwealth v. Breakwater Co.*, 214 Miss. 10; *Postal Telegraph Cable Co. v. Chicopee*, 207 Miss. 341, 350; *Dickey v. Turnpike Co.*, 7 Dana (Ky.) 113; *Seebright v. Stokes*, 3 How. 151; *Price v. Pennsylvania Railroad*, 113 U. S. 218, 221; *St. Louis v. Western Union Telegraph Co.*, 148 U. S. 92, 100, 102; *Martin v. Pittsburg & Lake Erie R. R.*, 203 U. S. 284; 27 Sup. Ct. Rep. 100, 101.

Commonwealth v. Clossen, 229 Mass. 329, 334.

It never could have been intended by congress of the United States in conferring upon a corporation of one state authority to enter the territory of any other state and erect its poles and lines therein, to establish the proposition that such a company owed no obedience to the laws of the state into which it thus entered, and was under no obligation to pay fair proportion of the taxes necessary to its support.

St. Louis v. Western Union Tel. Co., 148 U. S. 92, 102.

This does not sustain the plaintiff in his assertion that the state has lost its power to regulate the post roads.

XII

THE ORDER IS NOT A REGULATION OF INTERSTATE COMMERCE, BUT A REGULATION OF THE STATE HIGHWAYS UNDER THE POLICE POWERS OF THE STATE.

This order is not open to the objection made by Mr. Justice Brandeis in *Buck v. Kuykendall*, 267 U. S. 307, 315, namely: "Its primary purpose is not regulation with a view to safety or to conservation of the highway, but the prohibition of competition." It can not be said that the order in this case prohibits interstate commerce. It is true that it limits the amount of a given load, but it does not prohibit the amount of interstate commerce that the defendant may carry, nor does it in any way interfere with competition. It is a regulatory measure with a view to the safety of the public highways on which the people of the state of Oregon have spent many millions of dollars. Such regulations are sustained by an overwhelming weight of authorities, some of which are given below:

> In the absence of national legislation covering the subject, a state may rightfully prescribe uniform regulation necessary to the public safety and order in respect to the operation of its highways, over all motor vehicles,—those moving interstate commerce as well as others—and to this end it may require the registration of such vehicles, of the license and of the drivers, charging therefor reasonable fees graduated according to horsepower of the engine, a particular measure of size, speed and difficulty of control. This is but an exercise of police power uniformly recognized as belonging to the state and essential to the preservation of health, safety and comfort of her citizens, and does not constitute a direct or material burden on interstate commerce. The reasonableness of the state's action is always subject to inquiry in so far as it affects interstate commerce, and in that regard it is likewise

subordinated to the will of congress. *Barbier v. Connolly*, 113 U. S. 27, 30, 31; 5 Sup. Ct. Rep. 357; *Smith v. Ala.*, 124 U. S. 465, 580; *Awlton v. Steel*, 15 U. S. 133, 136; *Holder v. Hardy*, 169 U. S. 366, 392.

Hendrick v. Maryland, 35 Sup. Ct. Rep. 140, 142; 235 U. S. 610, 622.

The mere fact that the order affects people engaged in interstate commerce is no reason for saying that it is an interference or an attempt to regulate interstate commerce. "Generally legislation of this kind prescribing the liabilities and duties of citizens of the state, without distinction as to pursuit or calling, is not open to any valid objection because it may affect a person engaged in foreign or interstate commerce. Objections might with equal propriety be urged against legislation prescribing the forms in which contracts shall be authenticated or property descend or be distributed on the death of its owner, because applicable to the contracts of estates or persons engaged in such commerce. In conferring upon congress the regulation of commerce it was never intended to cut the state off from legislating on all subjects relating to the life, health and safety of its citizens, although the legislation might indirectly affect the commerce of the country. Legislation in a great variety of ways may affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the constitution, and it may be said generally that the legislation of a state not directed against commerce or any of its regulations, or relating to the rights, duties and liabilities of citizens, will only indirectly and remotely affect the operation of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or any other pursuit.

Smith v. Alabama, 124 U. S. 465, 474, 475.

It is also the law that the state may under its police power regulate and even exclude property that is dangerous to the property of the citizens of the state, even though it be a subject of interstate commerce, as pointed out in *Leisy v. Hardin*, 135 U. S. 153, 10 Sup. Ct. Rep. 681, 700; *Railroad Co. v. Husson*, 95 U. S. 465, 471.

Mr. Justice Strong states in *Railroad Co. v. Husson*, 95 U. S. 465, 471, that a state in the exercise of its police power could legislate to prevent the spread of crime or pauperism, or the disturbance of peace, as well as justify the exclusion of property dangerous to the property of citizens of the state, as, for instance, animals having contagious or infectious diseases. All these exertions of power are in immediate connection with the protection of persons and property against noxious acts of other persons, or such a use of property as is injurious to the property of others. They are self-defensive.

> It is the settled construction of every regulation of commerce that under the sanction of its general laws no person can introduce into a community malignant diseases or anything which contaminates its morals or endangers its safety, and this is an acknowledged principle applicable to all general regulations that individuals in the enjoyment of their own rights must be careful not to injure the rights of others. From the explosive nature of gunpowder, a city may exclude it. Now this is an article of commerce and is not known to carry infectious disease; yet to guard against injuries a city may prohibit its introduction. These exceptions are always implied in commercial regulation where the general government is permitted to have exclusive power. They are not regulations of commerce, but acts of self-preservation, and, although they affect commerce to an extent, such effect is the result of the exercise of an endowed power in the state.
>
> *Leisy v. Hardin*, 135 U. S. 100, 140.

Also:

5 Howard, 576, 590, 610, 618.

Incidentally affecting interstate commerce will not invalidate the act. *Kane v. N. J.*, 242 U. S. 160; *Hendrick v. Maryland*, 235 U. S. 610, Minn. rate cases, 230 U. S. 352; *Monangahela Nor. Co. v. U. S.*, 148 U. S. 312; *Covington Bridge Co. v. Ky.*, 154 U. S. 224.

Interstate Motor Transit Co. v. Kuykendall, 284 Fed. 882, 885.

Huse v. Glover, 119 U. S. 543, 548, 549, 550.

Packet v. Koekuk, 95 U. S. 80, 84.

XIII

CONGRESS HAVING MADE NO REGULATION IN REGARD TO THE USE OF THE HIGHWAYS, THE POWER IS VESTED IN THE LEGISLATURE OF THE STATE, BEING A LOCAL AND CONCURRENT POWER.

The doctrine declared in these several decisions is in accordance with a more general doctrine now generally established, that the commercial power of congress is exclusive of state authority only when the subjects upon which it is exercised are liberal in their character and admit and require uniformity of regulation affecting alike all the states. Upon such subjects only that authority can act which can speak for the whole country. Its nonaction is therefore a declaration that they shall remain free from all regulations. *Welton v. State of Mo.*, 91 U. S. 275; *Henderson v. Mayor of N. Y.*, 92 Ind. 259; *County of Mobile v. Kimball*, 102 Ind. 691.

On the other hand, where the subjects over which the power may be exercised are local in their nature or re-

place or constitute mere addition to commerce, the authority of the state may be exercised for the regulation and management until congress interferes and supersedes, as said in the case last cited. (Uniformity of commercial regulation which the grant to congress was designed to secure against conflicting state provisions, was necessarily intended only for cases where such uniformity is practicable. Where from the nature of the subject or the sphere of its operation the case is local and limited, special regulations adapted to the immediate location could only have been contemplated. State action upon such subjects can constitute no interference with commercial power of congress, for when that body acts the state authority is superseded. Action of congress upon these subjects of local nature or operation, unlike its inaction upon matters affecting all the states in requiring the uniformity of regulation, is not to be taken as the declaration that nothing shall be done in respect to them, but is rather to be deemed a declaration for the time being and until it sees fit to act, and may be regulated by the state authorities.)

Escanaba Co. v. Chicago, 107 U. S. 678, 687.

Either absolutely to assert or deny that the nature of this power requires exclusive legislation by congress is to lose sight of the nature of the subject of its power, and to assert concerning all of them, whether it is merely applicable but to a part, whatever subjects of this power are in their nature national or immediate only of one uniform system or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by congress. That this can not be affirmed by the laws for the regulation of pilots and pilotage is plain. The act of 1789 retains a great and alternative declaration by the first congress, that the nature of this subject is such that until congress should find it necessary to exert its power it should be left to the legislation of the state; that it is local and not national; that it is likely to be best provided for—not by one system or plan of regulation, but by as

many as the legislative discretion of the several states should deem applicable with the local peculiarities of the boards within their limits.

Cooley v. Board of Wardens of the Port of Philadelphia et al., 12 Howard, 229, 319.

Leisy v. Hardin, 135 U. S. 100, 119, 120.

Also:

Simpson v. Shepard, Min. Rate Cases, 57 L. Ed. 1511, 1542.

Gibbons v. Ogden, 9 Wheat I, 6 L. Ed. 71, 72.

Hendrick v. Maryland, 235 U. S. 610, 35 Sup. Ct. Rep. 140, 142.

XIV

THE QUESTION OF THE HIGHWAYS BEING PROPERLY MAINTAINED IS A QUESTION FOR THE FEDERAL GOVERNMENT, AS IS EXPRESSLY PROVIDED BY THE STATUTE, AND NOT A QUESTION SUBJECT TO COLLATERAL ATTACK BY THE DEFENDANT.

Section 7 of the act provides if at any time the secretary of agriculture should find that any road in any state, constructed under the provisions of this act, is not being properly maintained, he shall give notice of such fact to the highway department of such state, and if within four months from the receipt of said notice said road has not been put in proper condition of maintenance, then the secretary of agriculture shall thereafter refuse to approve any project for road construction in said state or the civil

subdivision thereof, as the fact may be, whose duty it is to maintain said road, until it has been put in a condition of proper maintenance. This specifically points out the way in which the general government is to supervise the maintenance of the highways, and, since it is a statutory act and the remedy is provided, this remedy must be followed as there is no common law remedy applicable to this situation.

Where a statute to attain a particular object prescribes the mode of procedure to enforce it, that mode must be pursued.

Lawson, Rights, Remedies and Practice, vol. 7, p. 5932, § 3777.

But where a statute creates a new right, and prescribes a remedy for its violation, the remedy thus prescribed is exclusive.

25 R. C. L., § 283, p. 1058.

Cal. v. John Craycroft, 2 Cal. 243 at 244.

Andover and Medford Turnpike Corp. v. Gould, 6 Mass. 39, 43.

Refutation

We were of necessity required to prepare our brief in advance of receipt of a copy of appellants' brief, and for that reason we have not in the brief proper given specific attention to the several points relied upon by the appellants. We, therefore, meet appellants' argument under the above topic.

APPELLANTS HAVE NEITHER IN THEIR BRIEF NOR IN THEIR PLEADINGS ESTABLISHED OR SUSTAINED ANY RIGHT, IN FACT OR IN LAW, TO THE RELIEF DEMANDED, for

1. The premise upon which they predicate their argument is false and illogical.
2. The deductions and conclusions raised are unwarranted and erroneous.

False and Illogical Premise:

The premise upon which appellants seek to advance their argument assumes that the Oregon statute and the order of the Oregon commission does violence to the interstate commerce clause of the federal constitution, and assumes further that such law and order offend the provisions of the said federal aid act, and further assumes that a contract between the federal government and the State of Oregon exists for the benefit of appellants.

In the first place there has not been disclosed by appellants, and we challenge them to show that congress has ever legislated with respect to the regulation of public highways, such as is provided for in the Oregon law and by the Oregon commission. The Oregon law (chapter 371, General Laws of Oregon, 1921, as amended), which is the law to which the Oregon Highway Commission points for

its authority, by its terms declares the statute to be an exercise of the police powers of the State of Oregon. Section 51 of said chapter declares "the provisions of this act are declared to be an exercise of the police powers of the state, and this act shall be known as the 'Oregon motor vehicle law'."

Section 52 of this said act declares: "The purpose, object and intent of this act provides a comprehensive system for the regulation of motor and other vehicles in this state. * * *."

In passing upon this law, the Oregon supreme court said:

> The character of the registration fees may be determined from the act.
>
> Section 51 of Chapter 371, General Laws of Oregon of 1921, enacts:
>
> "The provisions of this act contained are declared to be an exercise of the police powers of the State of Oregon, and this act shall be known as the 'Oregon Motor Vehicle Law'."
>
> While not absolutely controlling, the legislative designation is an important factor in determining the character of the tax imposed: *Portland v. Portland Ry. Light & Power Co.*, 80 Or. 271, 305 (156 Pac. 1058), citing Gray, Lim. of Tax. Power, p. 42; *Briedwell v. Henderson*, 99 Or. 506, 514 (195 Pac. 575).
>
> Among the powers expressly granted to the national government is the control of interstate commerce. Article I, section 8, of the Constitution, provides that
>
> "The congress shall have power * * * to regulate commerce with foreign nations, and among the several states * * *."
>
> Congress has exercised the power granted it in relation to interstate commerce in a variety of acts; but it has passed no statute that in any way inhibits the exaction by

the state of the fees in question by way of compensation from the plaintiff for the privilege of driving its motor cars over the highways of this state.

State laws may affect interstate commerce without conflicting with the constitutional provision appealed to.

Camas Stage Co., Inc. v. Kozer, 104 Or. 600.

The Oregon supreme court in its opinion in the above entitled case reviews a number of United States supreme court decisions supporting the comment and opinion of the Oregon supreme court, and in that opinion the Oregon supreme court cites the following authorities:

Transportation Co. v. Parkersburg, 107 U. S. 691, 699 (27 L. Ed. 584, 2 Sup. Ct. Rep. 732, see, also, Rose's U. S. Notes).

Huse v. Glover, 119 U. S. 543 (30 L. Ed. 487, 7 Sup. Ct. Rep. 313).

Lindsay & Phelps Co. v. Mullen, 176 U. S. 126 (44 L. Ed. 400, 20 Sup. Ct. Rep. 325).

Kane v. New Jersey, 242 U. S. 160 (61 L. Ed. 222, 37 Sup. Ct. Rep. 30) affirming 81 N. J. L. 594 (80 Atl. 453, Ann. Cas. 1912D, 237).

Appellants have cited many provisions of the act of congress known as the federal aid act, but we are unable to find wherein they have cited or pointed out a provision which takes from the State of Oregon jurisdiction over its highways, or denies to the state the right to regulate or police its highways. The authority given to the secretary of agriculture by the terms of the federal act is an authority which goes to the subject of highway construction and not highway use or highway regulation.

Appellants' premise is false and illogical on their further assumption that the acceptance by the State of Oregon of the terms and provisions of the federal highway act and the pledge of the state to cooperate with the federal government in the construction of roads created a contract for the benefit of appellants.

It will be noted that the provisions of the federal highway act call for cooperation between the state, through its State Highway Department, and the federal government, through the secretary of agriculture, and so long as that cooperation exists to the satisfaction of the representative of the federal government and the representative of the state the terms of the act are satisfied, and it does not lie within the privilege of appellants to declare or show that the State of Oregon is delinquent.

Deductions and Conclusions Erroneous:

Having assumed that congress has legislated on the subject of regulation of public highways, and having assumed that the acceptance by the State of Oregon of the terms of the federal highway act resulted in a surrender of the jurisdiction of the state over its own highways, and having assumed that the federal act and the Oregon statute became a contract between the State of Oregon and the federal government for the benefit of appellants,

appellants then proceed to outline and disclose evils and burdens which they claim befell them and their business, and because of those alleged evils and burdens they ask that the State of Oregon and its highway commission be restrained from enforcing the Oregon law having for its object and purpose the welfare of the general public and the preservation of its highways.

The language of the federal legislation and the language of the Oregon legislation applicable to the subjects under discussion, together with the rules and regulations of the secretary of agriculture covering the matter of highway construction as contemplated by the federal law and the order of the Oregon State Highway Commission, which order is now challenged, are all reproduced in the appendix which is a part of this brief. A casual reading of these several provisions will promptly reflect and disclose the erroneous, illogical and unwarranted position taken by the appellants.

The false and erroneous conclusions of appellants are especially manifest when one reads and reviews the authorities cited in support of their position.

On page 23 of their brief, in large type, they make the general statement that the state has surrendered complete jurisdiction of the highways which fall under the federal aid act. They, however, fail to point out the portion of the federal act which sustains them in this conclusion, and, as stated before, we are not able to find anywhere that the act provides such a blanket statement. It is true that the secretary of agriculture has a right to demand certain requirements with respect to construction and repair. Further than that the state makes no surrender of its sovereign power. A state legislature can not grant away its police powers even if it so desires (page 16 of appellees' brief, section V). No such attempt has been made

on the part of the state to surrender, or the federal government to take over, the regulation of the highways. The following cases cited by appellants merely point out that the federal government could enforce its contracts entered into between the state or states and the federal government:

Searight v. Stokes et al., 3 How. 151, 11 L. Ed. 537.

Neil, Moore & Co. v. Ohio, 3 How. 720, 11 L. Ed. 800.

Achison v. Hudleson, 12 How. 293, 13 L. Ed. 993.

State of Indiana v. U. S., 148 U. S. 148, 37 L. Ed. 401.

U. S. v. California & Oregon Land Co., 148 U. S. 31, 37 L. Ed. 354, 356, 362.

U. S. v. Dalles Military Road Co., 140 U. S. 599, 35 L. Ed. 561, 562.

U. S. v. Union Pacific R. Co., 160 U. S. 1, 40 L. Ed. 319.

Lake Superior, etc. R. R. Co. v. U. S., 93 U. S. 442, 23 L. Ed. 965.

Grand Trunk Western R. Co. v. U. S., 252 U. S. 112; 64 L. Ed.

Wisconsin Central R. Co. v. U. S., 164 U. S. 190; 41 L. Ed. 399.

We concede that the question is well settled that government contracts, like all other contracts, are enforceable, but these cases in no way sustain the proposition that the federal aid act gives the federal government complete jurisdiction of the highways. The case of *Pensacola Tel. Co. v. W. U. Tel. Co.*, 96 U. S. 1, 24 L. Ed. 708, which appellants refer to on page 25 of their brief, was a case of the Florida legislature giving exclusive control of the operation of telegraph communications within two counties that so separated the rest of the state that it prohibited other companies from operating in the adjoining territory,

and for that reason the supreme court held that it was a prohibition, and, therefore, an interference with interstate commerce; but the order of the commission and question in this case is not a prohibition but a regulatory measure.

Nielsen v. Or., 212 U. S. 315, 319, 53 L. Ed. 528, 529, cited on page 32 of appellants' brief, raises a question of jurisdiction in Washington and Oregon in regard to the Columbia river, and hinges on a territorial question of jurisdiction and does not sound in a question of governmental jurisdiction, thus having no point in this case. *State of New Jersey v. Wilson*, 7 Cranch. 165, 3 L. Ed. 303, and *Buck v. Kuykendall*, 267 U. S. 307, are cited merely to reiterate that a general government contract is enforceable.

Appellants contend that the term "rules and regulations" as used in the federal act, give complete jurisdiction to the secretary of agriculture over the highways given aid by the federal government. A reading of the said act will show that this grant of power to the secretary of agriculture only extended to the making of rules and regulations needed to carry out the body of the act or the provisions of the act when a state had accepted the conditions. It does not mean rules and regulations for the purpose of controlling all the government functions needful in operating and caring for a great system of highways.

In sustaining our interpretation we cite the words of the act of July 11, 1916, ch. 241, 39 Sta. L. 355, sec. 6:

> The construction work and labor in each state shall be done in accordance with its laws, and under the direct supervision of the state highway department subject to the inspection and approval of the secretary of agriculture and in accordance with the rules and regulations made pursuant to this act. * * *

Thus it will be seen that the state has complete jurisdiction and supervision of the project, and that the secretary of agriculture only acts as an inspector thereof in behalf of the federal government. It can not be seriously contended that the state has surrendered its control of the highways until some act has been set out showing at least an attempt to do so. Furthermore, the state legislation with respect to the matter under consideration has furnished adequate state laws for the complete supervision of the state highways, which is opposed to appellants' contention. The federal government has passed no laws for the supervision of the state highways; therefore, the jurisdiction must rest with that department of government which exercised it prior to the passing of the acts herein set forth.

The term "State Highway Department," as used in the federal act, indicates that the state shall retain its jurisdiction over its highways. The definition reads as follows, in the act of July 11, 1916, ch. 241, 39 Stat. L. 355, sec. 2:

> The term "State Highway Department" shall be construed to include any department of another name, or commission, or official or officials of a state empowered under its laws to exercise the functions ordinarily exercised by a state highway department.

Act of November 9, 1921, ch. 119, Stat. L. 42, 212, sec. 18:

> That the secretary of agriculture shall prescribe and promulgate all needful rules and regulations for the carrying out of the provisions of this act, including such recommendations to congress and the state highway departments as he may deem necessary for preserving and protecting the highways and insuring the safety of traffic thereon.

This section would seem to indicate that if the secretary of agriculture desires any special regulations in regard to the preservation of highways he must secure it through congress or the state highway department. Furthermore, the act of February 12, 1925, ch. 219, 43 Stat. L. 889, sec. 3, provides "that in any state where the existing constitution or laws will not permit the state to provide revenues for the construction, reconstruction or maintenance of highways, the secretary of agriculture shall continue to approve projects for said state for the period covered by this act if he shall find that said state has complied with the provisions of this act in so far as its existing constitution and laws will permit"; thus making it possible for the United States to aid a state in the construction of highways where its constitution will not even permit of appropriation of funds for such special purposes. It is apparent that it was the purpose of congress to aid the states rather than to usurp state control over highways.

The cases cited under paragraph III, page 34 of appellants' brief, with the exception of *Buck v. Kuykendall*, 267 U. S. 307, are railroad rate cases, and are not in point, or in harmony with the theory advanced by the appellants in their argument set forth therein for, while it is true that proper parties have a right to be heard as to whether rates are reasonable as provided by rate commissions, yet it is common knowledge that the exercise of a police power does not fall under this rule, and the mere fact that the appellant has been a loser through the exercise of police power gives him no reason or ground for complaint, as established in brief, supra, page —; also in the following authority:

> It is said that if the same requirement were made for the other grade crossings of the road, it would soon be bankrupt. That the states might be so foolish as to kill

a goose that lays golden eggs for them has no bearing on their constitutional rights. If it reasonably can be said that safety requires the change, it is for them to say whether they will insist upon it, and neither prospective bankruptcy nor engagement in interstate commerce can take away this fundamental right of the sovereign of the soil. *Denver R. & G. R. Co. v. Denver*, 250 U. S. 241, 246, 63 L. Ed. 958, 962, 39 Sup. Ct. Rep. 450. To engage in interstate commerce the railroad must get on to the land; and, to get on to it, must comply with the conditions imposed by the state for the safety of its citizens. Contracts made by the road are made subject to the possible exercise of the sovereign right. *Denver & R. G. R. Co. v. Denver*, 250 U. S. 241, 244, 63 L. Ed. 958, 961, 39 Sup. Ct. Rep. 450; *Union Dry Goods Co. v. Georgia Public Service Corp.*, 248 U. S. 372, 63 L. Ed. 309, 9 A. L. R. 1420, P. U. R. 1919C, 60, 39 Sup. Ct. Rep. 117; *Louisville & N. R. Co. v. Mottley*, 219 U. S. 467, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671, 31 Sup. Ct. Rep. 265.

In *Buck v. Kuykendall*, 267 U. S. 307, the court said that the act was not a regulatory measure, but the prohibition of competition. Therefore, the case has no weight in relation to the proposition under consideration in this case, as the order of the commission was not a prohibition of competition, nor even an attempt to regulate competition, but rather an attempt to regulate the use of the highways in such manner that they would be preserved for the public good.

NEITHER THE STATE OF OREGON NOR ITS HIGHWAY COMMISSION IS DENIED BY THE FEDERAL CONSTITUTION, BY ACT OF CONGRESS, OR BY COURT DECISION THE RIGHT TO POLICE AND REGULATE THE USE OF THE PUBLIC HIGHWAYS.

The subject of statutory regulation of motor vehicles is in some respects new. Transportation by motor vehicle

is an evolution. It is expanding and developing beyond conjecture or imagination, and both the states and the federal government must, to a large extent, pioneer in the matter of regulation. Those principles of law which have guided courts in the past with respect to subjects of transportation are not certain and unfailing guides with respect to the regulation of the motor vehicle. Heretofore the movement of passengers or freight has been upon carriers which moved upon rolling stock and roadbeds owned or controlled by the carriers, but the motor vehicle is moving upon a roadbed owned, built and maintained by the public. Therefore, there is presented a dual ownership—one the public, the other private owners; hence we repeat that those principles of law which have guided law-making bodies and courts in dealing with the subject of transportation of property or persons can not be relied upon as a complete guide either in the making of law or in the construction of law, or in its administration, when that law and the administration has to do with the motor vehicle.

The subject of regulation of the motor vehicle has been before this court on several occasions. Prominent among the cases considered by this court are the following:

Buck v. Kuykendall, U. S. Adv. Opinions No. 10, p. 301; 69 L. Ed.

Duke v. Public Utilities Commission of Mich., vol. 45, No. 7; Adv. Sheets Supreme Court Reporter, p. 191; 69 L. Ed.

Bush v. Maloy et al., U. S. Court Adv. Opinions No. 10, 303; 69 L. Ed.

Marion L. Frost et al. v. Railroad Commission of California, U. S. Sup. Ct. Adv. Sheets No. 16, p. 682.

As we read the opinions of the court in the above cases, the right of the state to regulate the use of its public highways has always been recognized and conceded. In fact, in the last case, which was *Frost v. Railroad Commission of California*, supra, and which was a case involving the right of the State of California to regulate the use of its highways and to license motor vehicles using those highways for the purpose of carrying passengers or freight for hire, the court said: "There is involved in the inquiry not a single power, but two distinct powers. One case—the power to prohibit the use of the public highways in proper cases—the state possesses; and the other—the power to compel a private carrier to assume, against his will, the duties and burdens of a common carrier—the state does not possess."

We find nothing in the Oregon law, or in its administration by the Oregon State Highway Commission, which is in conflict with the federal constitutional provision, federal act, or the decisions of this court.

Conclusion

We conclude this brief as we began it, by urging that appellants are not entitled to relief for the reason that they have not brought themselves within the provisions of any rule of law or within the scope of any statute, state or federal, which offers or guarantees the protection they demand.

The Oregon law and the conduct of the Oregon Highway Commission are not at enmity with any provision of the federal constitution, nor do they offend against any act of congress. The State of Oregon is quite within its rights when it, by legislative act, attempts to regulate traffic on its public highways. The rights and privileges of appellants are not paramount to the best interests of the general public. Appellants have a right to the use and enjoyment of the public highways, but when their activities and use of the highways becomes so burdensome as to destroy the highways, then they must yield to reasonable regulation. To uphold the appellants in their demand that the public highways be maintained at any cost for the comfort and commerce of appellants will result in the imposition of a financial burden beyond the capacity or available revenues of the state. The commerce now enjoyed by the appellants is the result of good roads, but there is a limit beyond which the public can not go in the expenditure of money for the construction and maintenance of highways. The demands of appellants and those similarly engaged are fast forcing the public to that financial limit.

On the theory advanced by appellants, the welfare of the general public or the financial stability of the state are not matters of concern in the face of privileges which they claim are guaranteed under the federal constitution and the federal aid highway act, and they ask

is court, as they asked the court below, to restrain the tate of Oregon, through its State Highway Commission, om preserving for the general public its improved high-ays. This they ask on their showing that interstate com-erce has been unduly burdened, that the provisions of the ederal aid act have been violated, and that imaginary ontractural relations have been disturbed. Appellants, e contend, have not brought themselves within the au-nority or power of this court to grant the relief they emand.

Respectfully submitted,

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Appendix

Act of Sixty-fourth Congress of the United States of America, approved July 11, 1916, Chapter 241, 39 Stat. L. 355.

Title of Act: "An Act to provide that the United States shall aid the States in the construction of rural post roads, and for other purposes."

SEC. 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the secretary of agriculture is authorized to cooperate with the states, through their respective state highway departments, in the construction of rural post roads; but no money apportioned under this act to any state shall be expended therein until its legislature shall have assented to the provisions of this act, except that, until the final adjournment of the first regular session of the legislature held after the passage of this act, the assent of the governor of the state shall be sufficient. The secretary of agriculture and the state highway department of each state shall agree upon the roads to be constructed therein and the character and method of construction: *Provided,* that all roads constructed under the provisions of this act shall be free from tolls of all kinds.

SEC. 2. That for the purpose of this act the term "rural post road" shall be construed to mean any public road over which the United States mails now are or may hereafter be transported, excluding every street and road in a place having a population, as shown by the latest available federal census, of 2,500 or more, except that portions of any street or road along which the houses average more than 200 feet apart; the term "state highway department" shall be construed to include any department of another name, or commission, or official or officials, of a state empowered, under its laws, to exercise the functions ordinarily exercised by a state highway department; the term "construction" shall be construed to include reconstruction and improvement of roads;

"properly maintained" as used herein shall be construed to mean the making of needed repairs and the preservation of a reasonably smooth surface considering the type of the road; but shall not be held to include extraordinary repairs, nor reconstruction; necessary bridges and culverts, shall be deemed parts of the respective roads covered by the provisions of this act.

CREATION AND POWERS OF OREGON STATE HIGHWAY COMMISSION

Section 1, article 2, chapter 237, General Laws of Oregon, 1917:

SECTION 1. *Highway Commission.* There is hereby created a state highway commission, which shall consist of three members to be appointed by the governor, one from each congressional district of the state, to hold office for a period of three years; provided, however, that the members forming the first commission hereunder, who shall be appointed within 30 days after the passage of this act, shall serve as follows: One commissioner up to and including March 31, 1918, and one commissioner up to and including March 31, 1919, and one commissioner up to and including March 31, 1920. Before the expiration of the term of a commissioner, the governor shall appoint his successor to assume his duties on April 1st next following; provided, however, in case of a vacancy for any cause, the governor shall make an appointment to become immediately effective for the unexpired term; said successor to be appointed from the same congressional district in which the vacancy occurrs.

SECTION 5. Said commission shall have the power to carry out the provisions of this act and its duties shall be such as are provided herein. The commission is hereby authorized to make such rules and regulations as it may deem necessary. Said commission shall have general supervision over all matters pertaining to construction of state highways, letting of contracts therefor and the selection of materials to be used in the construction of state highways, under the authority of this act,

and the commission is hereby authorized and empowered to purchase or contract for, independent of any specific or particular job, improvement or road construction work, whether the same be done by contract, force account or otherwise, any material, supplies or equipment necessary or deemed necessary for the carrying out of the provisions and purposes of this act, in such quantities and amount and in such manner as in the judgment of the commission will be for the best interest of the state. Said commission is authorized, under direction of the attorney general, to employ counsel, fix his duties and provide his compensation. Said commission shall meet at such times and for such periods in the office of the highway department, or at such other place as it may select, for the transaction of any business that may be necessary for the satisfactory execution of the provisions of this act. The commission shall also determine and adopt the general policy of the highway department and decide questions relating to the administration of the department. The commission shall publish an annual report to the governor containing the report of the engineer and such general information as may appear desirable regarding the construction, improvement or maintenance of highways and bridges, and other information gathered and available in the office of the highway department. Said commission shall designate, construct or cause to be constructed a system of state highways within the state of Oregon, which highways shall be designated by number, and by the point of beginning and terminus thereof. That the legislature of the State of Oregon hereby assents to the provisions of the act of congress, approved July 11, 1916, entitled "An act to provide that the United States shall aid the states in the construction of rural post roads, and for other purposes" (39 United States Statutes at Large, p. 355.) The state highway department is hereby authorized to enter into all contracts and agreements with the United States government relating to the survey, construction or improvement and maintenance of roads under the provisions of the said act of congress, to submit such scheme or program of construction or improvement and maintenance as may be required by the secretary of agriculture, and do all other things necessary fully to carry out the cooperation contemplated and provided for by the said act. For the construc-

tion or improvement and maintenance of rural post roads the good faith of the state is hereby pledged to make available funds sufficient to equal the funds apportioned to the state by or under the United States government during each of the five years for which federal funds are appropriated by section 3 of the said act, and to maintain the roads constructed or improved with the aid of funds so appropriated and to make adequate provisions for carrying out such maintenance. The good faith of the state is further pledged to make available funds at least sufficient when combined with the funds made or to be made by the several counties to equal the sum apportioned to the state by the secretary of agriculture under the rules and regulations approved by him for carrying out section 8 of the act of congress; provided, that funds made so available from the state highway fund shall be spent only upon the highways comprising the system of state roads; and the good faith of the state is further pledged to maintain such roads and to make adequate provisions for carrying out such maintenance, and other acts of congress for similar purposes. The state highway commission is hereby authorized and empowered to enforce all laws now in effect and which may hereafter be enacted and which relate to highways and to the operation of vehicles thereon within the state of Oregon and to arrest the violators of any of the provisions of the laws of the State of Oregon which are applicable to highways or to the movement of vehicles thereon, and the said state highway commission in exercising the powers hereby granted may, in its discretion, appoint and employ such deputies and other assistants as it may deem necessary to properly enforce such laws, and it is authorized to pay all necessary expenses out of the highway fund, and the secretary of state is hereby authorized to audit all claims approved by the state highway commission for this purpose in the same manner in which claims of the state highway commission for other purposes are audited and paid. Any person deputized or delegated with authority by the state highway commission to enforce the laws of the State of Oregon relative to highways, or to the movement of vehicles thereon, shall have authority to arrest without writ, rule, order, or process any person or persons detected by him in the act of violating any of the provisions of the laws of this state relat-

ing to highways, or to the movement of vehicles thereon, and all persons so deputized or delegated are hereby made peace officers of this state for that purpose and shall have authority to execute all process issued for the violation of any of the laws of the State of Oregon relating to highways, or to the movement of vehicles thereon. Any person who knowingly or wilfully resists or opposes such officer in the discharge of his said duties shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished as provided by law.

ACCEPTANCE BY STATE OF OREGON OF AID OFFERED BY FEDERAL GOVERNMENT

Chapter 175, General Laws of Oregon, 1917. Title of Act:

To accept the benefits of the act passed by the Sixty-fourth Congress of the United States, entitled "An act to provide that the United States shall aid the States in the construction of rural post roads, and for other purposes," and to provide for the issuance of bonds of the State of Oregon to raise such money as may be required to meet the requirements of said federal statute, and to authorize the state board of control to take such action and perform such duties as may be necessary to meet the requirements of said federal act and federal officials acting under said act.

Be It Enacted by the People of the State of Oregon:

SECTION 1. That the State of Oregon hereby accepts the provisions of said act and agrees to cooperate with the federal government in carrying out the provisions thereof.

SECTION 3. The state board, commissioners or officers having control of the state highways in the state of Oregon are hereby authorized, empowered and directed to enter into such contracts, appoint such officers and do any other act or thing necessary to fully meet the requirements of the United States and the officers acting under said federal statute.

Section 36, chapter 371, General Laws of Oregon, 1921, as amended by chapter 10, General Laws of Oregon, 1921, Special Session, as amended by chapter 145, General Laws of Oregon, 1923.

Whenever the highway commission or any county court or board of county commissioners of any county of this state shall find that any public highways of the state or section thereof is being damaged by reason of being subjected to any particular kind or character of traffic, or shall find that, in the judgment of the state highway commission or of the county court or board of county commissioners of any county of this state, it would be for the best interests of the state or county and for the protection from undue damages of any highway or highways or of any section or sections thereof and, with respect to such highways or any sections thereof, to reduce the maximum weights and speeds in this act provided for vehicles moving over or upon the highways of this state, or if, in the judgment of the state highway commission or of any county court or board of county commissioners of any county of this state, it would be for the best interests of the state or of the county and for the protection from undue damage of any highway or highways or of any sections thereof to close such highway or highways or any sections thereof for any or all traffic or for any particular class of traffic, or for the moving thereon of any kind, size or weight of vehicles or any kind of commodity, freight or thing, then, in that event, the state highway commission or the county court or board of county commissioners of any county may, and is hereby authorized and empowered to, determine and fix the reduced weights and speeds, which shall be the maximum weights and speeds for vehicles or things moving over such highway or highways or any section thereof, and/or to prohibit the use of such highway or highways or any section or sections thereof for moving thereon any kind, size or weight of vehicle or any kind of commodity, freight or thing, for such period or periods of time as, in the judgment of said state highway commission or county court or board of county

commissioners, will be for the best interest of the state or county; provided, that the authority herein granted shall not authorize the closing of any road or section thereof to the movement or transportation thereover of products of the soil by persons having no other road or highway upon which to travel, but the hauling of such products over such highway shall be subject to the rules and regulations of the county court, board of county commissioners of any county of the state or the state highway commission, as the case may be. This proviso, however, does not apply when it becomes necessary to close any road during construction. The highway commission or any county court or board of county commissioners of the respective counties of this state may make and include in such order any rule or regulation not inconsistent with the foregoing provisions and authority for the preservation and protection of any public highway or section thereof, and any violation of any of the rules, regulations, terms, conditions or provisions of said order shall be deemed a violation of the provisions of chapter 371, General Laws of Oregon, 1921, as amended by chapter 8, General Laws of Oregon, 1921, and any person or corporation who violates any of the said provisions or any part of said order shall, upon conviction thereof, or upon entering a plea of guilty, be punished by a fine of not to exceed $400 or by imprisonment in the county jail for not to exceed one year, or by both such fine and imprisonment in the discretion of the court. The state highway commission or the county court or board of county commissioners, as the case may be, shall post a notice in a conspicuous manner and place, so it can be readilly seen and read, at each end of any highway or section thereof, for which limitations of traffic, as in this section provided, have been determined and fixed. Such notice shall state plainly the limitations or prohibitions of traffic determined and fixed, provided, that the authority granted in this section to the county courts or boards of county commissioners shall be limited to county roads and shall not extend to state highways over which the state highway commission is hereby granted exclusive control, and the said authority granted in this section to the state highway commission shall, as to said commission, be limited to state highways only. [Laws 1921, Special Session, c. 8, § 10, pp. 29, 30; Laws 1923, c. 145, § 1, pp. 204-206.]

RULES AND REGULATIONS OF THE SECRETARY OF AGRICULTURE FOR CARRYING OUT THE FEDERAL HIGHWAY ACT (EXCEPT THE PROVISIONS THEREOF RELATIVE TO FOREST ROADS)

Regulation 1—Definitions

SECTION 1. For the purposes of these regulations, the following terms shall be construed, respectively, to mean:

Act—The act of congress approved July 11, 1916, entitled "An act to provide that the United States shall aid the states in the construction of rural post roads, and for other purposes" (30 Stat. 355), as amended by the act of congress approved February 28, 1919, entitled "An act making appropriations for the service of the postoffice department for the fiscal year ending June 30, 1920, and for other purposes" (40 Stat. 1200, 1201), and as amended by the act of congress approved November 9, 1921, entitled "An act to amend the act entitled 'An act to provide that the United States shall aid the states in the construction of rural post roads, and for other purposes,' approved July 11, 1916, as amended and supplemented, and for other purposes" (Public, No. 87, 67th Cong.).

Secretary—The secretary of agriculture of the United States.

Bureau of Public Roads—The bureau of public roads of the United States department of agriculture.

Authorized representatives of the Secretary—The chief of the bureau of public roads and such other officials and employees thereof as he may designate from time to time.

Federal aid highway system—The system of federal aid highways, established by actual agreement and joint action of the states and the secretary of agriculture, and upon which all federal aid funds shall be spent.

Primary highways—The primary or interstate portion of the federal aid highway system composed of not to exceed three-sevenths thereof.

Secondary highways—The secondary or intercounty portion of the federal aid highway system consisting of at least four-sevenths thereof.

Ten per cent fund—Items for engineering, inspection, and unforseen contingencies not exceeding 10 per cent of the total estimated cost of the construction.

Regulation 2—Application of Regulations

SECTION 1. These regulations apply to all provisions of the act, except the provisions thereof relative to forest roads and trails, unless hereafter so made applicable by order of the secretary.

SEC. 2. These regulations shall apply as fully where the extent to which the state may engage in road construction and maintenance work, or raise state revenues therefor, is limited by its existing constitution and laws as in any other case.

Regulation 3—Information for the Secretary

SECTION 1. Before any agreement is made upon any road or roads to be constructed in a state, or as to the character and method of construction, there shall be furnished to the secretary upon his request, by or on behalf of the state, general information as to its laws affecting roads and the authority of the state and local officials in reference to the construction and maintenance of roads; as to the state highway department, how equipped and organized; as to the existing provisions of its constitution or laws relative to the state revenues for the construction, reconstruction, or maintenance of roads; as to funds that will be available to meet the state's share of the cost of the construction work to be performed and the general source of such funds; and as to provisions made, or to be made, for maintaining roads upon which federal aid funds will be expended.

SEC. 2. Information requested by the secretary or his authorized representatives relating to the maintenance of roads constructed under the provisions of the act shall be furnished from time to time by the state highway departments on forms supplied by the bureau of public roads.

SEC. 3. Data furnished by or on behalf of a state shall be supplemented by such reports of the bureau of public roads as the secretary may from time to time require.

Regulation 4—Federal Aid Highway System Map

SECTION 1. Each state highway department shall file with the secretary of agriculture a state map showing the proposed federal aid highway system and indicating the primary and secondary portion thereof in such form and with such information as he may require.

SEC. 2. The secretary, through his authorized representatives, will make an examination of the proposed system and will from time to time notify the state highway department of the acceptability of the parts of the system examined.

SEC. 3. When agreement has been reached between the state highway department and the secretary as to the whole (or if the state so desires, of a material portion) of the federal aid highway system, the state shall make formal request for the approval of the secretary of agriculture. This request will be accompanied by a state map showing the full proposed federal aid highway system with the primary and secondary highways upon which formal approval is requested, in such form and with such information as may be prescribed by the secretary or his authorized representatives.

SEC. 4. Pending the formal approval of the state highway system in whole or in part by the secretary of agriculture, only such projects will be approved as are on routes indicated on the proposed federal aid highway system as submitted under section 1 and tentatively accepted by the secretary under section 2 of this regulation: *Provided*, That the secretary of agriculture may approve project statements submitted by the state highway departments prior to the selection, designation, and approval of the system of federal aid highways herein provided for if he may reasonably anticipate that the projects will become a part of such system.

Regulation 5—Project Statements

SECTION 1. A project statement may be submitted for the whole or any part of a continuous route or routes embraced in the federal aid highway system selected or designated in accordance with the provisions of the act, preference being given to such projects as will expedite the completion of a system of highways interstate in character.

SEC. 2. Prior to the selection, designation, and approval of the federal aid highway system, project statements may be submitted for any route or part of a route if the secretary may reasonably anticipate that such route will become a part of such system. After the federal aid highway system shall have been selected, designated, and approved no project statements shall be submitted for any route or part of a route not embraced in the system so selected, designated, and approved.

SEC. 3. A project statement shall contain such information as the secretary may require to be submitted on a form supplied by the bureau of public roads and shall be accompanied by a sketch map in sufficient detail and covering such length of road as may be necessary to determine the fitness of the location as a part of the federal aid highway system and with the termini of the proposed improvement indicated thereon.

Regulation 6—Surveys, Plans, Specifications, and Estimates

SECTION 1. The surveys, plans, specifications, and estimates shall show in convenient form and detail the work to be performed and the probable cost thereof, all in conformity with the standards, governing form, and arrangement prescribed by the secretary.

SEC. 2. Copies of the specifications shall be submitted with the plans and estimates, except that where standard specifications have been approved by the chief of the bureau of public roads a statement to the effect that approved standard specifications govern may be submitted in lieu of the printed documents.

SEC. 3. Until plans, specifications, and estimates for a project or part thereof have been submitted and found satisfactory for recommendation, and the state has been so notified by the district engineer of the bureau of public roads, no project or part thereof shall be let to contract.

SEC. 4. The estimate for each project shall show the estimated quantity and the estimated cost of each item of construction in detail and, separately, the 10 per cent fund, and shall not include any expense for advertising.

SEC. 5. Unless state standard contract and bond forms have been approved, there shall be submitted with each set of plans for the approval of the secretary copies of the form of contract, together with all documents referred to therein or made a part thereof, and of the contractor's bond which it is proposed to use on the project. No alteration of either of these forms, when once approved, shall be made until it is approved by the secretary.

SEC. 6. Where any part of the cost of a project is to be furnished by a county or other local subdivision or subdivisons of a state, the plans, specifications, and estimates shall be accompanied by certified copy of each resolution or order, if any, of the appropriate local officials, or such other showing as the secretary may require respecting the funds which are made available, or respecting the supervision of the construction of the road and of the control of the money provided for paying such cost.

SEC. 7. Right of way ample for any project shall be provided and no incidental damages to adjoining property, due to construction work paid for by or on behalf of the state, shall be included in the estimate or be paid in any part, directly or indirectly, by the federal government.

SEC. 8. Grade crossings occurring on the federal aid highway system shall be classified for priority of improvement by agreement between the state highway departments and the bureau of public roads.

SEC. 9. No part of the expense of making surveys, plans, specifications, or estimates, by or on behalf of the state prior to the beginning of construction work, shall be included in the estimate or paid by the federal government.

SEC. 10. Subsequent to the execution of the agreement no change which will increase the cost of a project to the federal government shall be made, except upon approval by the secretary of agriculture, and no changes shall be made in the termini or type, except upon approval of the chief of the bureau of public roads, but minor alterations which do not affect the general nature of the improvement or increase the total cost to the federal government may be authorized by the chief of the bureau of public roads or his authorized representative.

Regulation 7—Project Agreements

SECTION 1. A project agreement between the state highway department and the secretary shall be excuted in triplicate on a form furnished by the secretary. No payment shall be made by the United States unless or until such agreement has been executed, nor on account of work done prior to recommendation by the district engineer of the bureau of public roads that the plans, specifications, and estimates be approved.

Regulation 8—Contracts

SECTION 1. No part of the federal money set aside on account of any project shall be paid until it has been shown to the satisfaction of the secretary that adequate methods, either advertising or other devices appropriate for the purpose, were employed, prior to the beginning of construction, to insure economy and efficiency in the expenditure of such money.

SEC. 2. Upon publication of advertisements copies thereof shall be furnished to the bureau of public roads.

SEC. 3. Bids shall conform to the standard proposal form, and the items shall be the same as those contained in the estimate provided for in regulation 6, section 4.

SEC. 4. Copy of the tabulated bid prices, showing the unit prices and the totals of each bid for every project, shall be furnished promptly to the bureau of public roads.

SEC. 5. In advance of the acceptane of any bid sufficient notice of the time and place the contract is to be awarded shall be given to the bureau of public roads to enable it, if it so

desires, to have a representative present. When a bid has been accepted prompt notice thereof shall be given to the bureau of public roads.

SEC. 6. If the contract be awarded to any other than the lowest responsible bidder, the federal government shall not pay more than its pro rata share of the lowest responsible bid, unless it be satisfactorily shown that it was advantageous to the work to accept the higher bid.

SEC. 7. The specifications and plans shall be made a part of the contract.

SEC. 8. A copy of each contract, as executed, shall be promptly certified by the state highway department and furnished to the secretary, and no alteration in the contract shall be subsequently made without the approval of the secretary.

Regulation 9—Construction

SECTION 1. Suitable samples of materials to be used in construction work shall be submitted, by or on behalf of the state highway department, to the bureau of public roads whenever requested.

SEC. 2. Unless otherwise stipulated in writing by the secretary or his authorized representative, materials for the construction of any project shall be tested, prior to use, for conformity with specifications, according to methods prescribed or approved by the bureau of public roads.

SEC. 3. No part of the money apportioned under the act shall be used, directly or indirectly, to pay or to reimburse a state, county, or local subdivision for the payment of any premium or royalty on any patented or proprietary material, specification, process, or type of construction unless purchased or obtained on open actual competitive bidding at the same or a less cost than unpatented articles or methods, if any, equally suitable for the same purpose.

SEC. 4. The supervision of each project by the state highway department shall include adequate and continuous engineering inspection throughout the course of construction.

SEC. 5. Written notice of commencement and completion of work on any project shall be given promptly by the state highway department to the bureau of public roads.

SEC. 6. Reports of the progress of construction, showing force employed and work done, shall be furnished as requested by the secretary or his authorized representatives.

Regulation 10—Records and Cost Keeping

SECTION 1. Such records of the cost of construction, of inspection, of tests, and of maintenance, done by or on behalf of the state, shall be kept, by or under the direction of the state highway department, as will enable the state to report, upon the request of the secretary or his authorized representatives, the amount and nature of the expenditure for these purposes.

SEC. 2. The accounts and records, together with all supporting documents, shall be open at all times to the inspection of the secretary or his authorized representatives, and copies thereof shall be furnished when requested.

Reguation 11—Payments

SECTION 1. Vouchers, in the form provided by the secretary and certified as therein prescribed, showing amounts expended on any project and the amount claimed to be due from the federal government on account thereof, shall be submitted by the state highway department to the bureau of public roads, either after completion of construction of the project, or if the secretary has determined to make payments as the construction progresses, at intervals of not less than one month.

Regulation 12—Submission of Documents

SECTION 1. Papers and documents required by the act or these regulations to be submitted to the secretary may be delivered to the chief of the bureau of public roads or his authorized representatives and, from the date of such delivery, shall be deemed submitted.

RULES AND REGULATIONS FOR ADMINISTERING FOREST ROADS AND TRAILS

(Approved by the secretary of agriculture, March 11, 1922.)

Basis

That portion of section 2 of the federal highway act approved November 9, 1921, which defines the term "forest roads," all of section 23 of the said act, and such other portions of the act as apply to forest roads.

Regulation 1—Definitions

For the purpose of these regulations the following terms shall be construed, respectively, to mean:

SECTION 1. *Secretary*—The secretary of agriculture of the United States.

SEC. 2. *Bureau*—Bureau of public roads of the department of agriculture.

SEC. 3. *State*—Any state, territory, or insular possession.

SEC. 4. *State highway department*—As defined in the act.

SEC. 5. *County authorities*—The commissioners, supervisors, or officials in charge of the selection of roads in a county, road district, or town, and the expenditure of county funds for road building and maintenance.

SEC. 6. *Forest roads*—Roads wholly or partly within or adjacent to and serving the national forests.

SEC. 7. *Forest highway fund*—The appropriation made by the act for forest roads of primary importance to the state, counties, or communities within, adjoining, or adjacent to the national forests, to be known as forest highways.

SEC. 8. *Forest development fund*—The appropriation made by the act for roads and trails of primary importance for the protection, administration, and utilization of the national forests or when necessary for the use and development of the re-

sources upon which communities within or adjacent to the national forests are dependent, to be known as forest development roads.

SEC. 9. *Construction*—Reconstruction and improvement of roads as well as original construction.

SEC. 10. *Maintenance*—The making of necessary repairs and the preservation of a reasonably smooth surface, considering the type of road, but not extraordinary repairs or reconstruction.

SEC. 11. *Major project*—A road whose survey and construction shall be prosecuted under the supervision of the bureau. This term includes all road projects on the forest highway system except those—

(1) Which do not require the technical services of a highway engineering organization;

(2) Whose estimated average cost is less than $2,000 per mile.

The term includes forest development roads whose estimated average cost exceeds $5,000 per mile, or which require the technical services of a highway engineering organization.

SEC. 12. *Minor project*—A road whose survey and construction shall be prosecuted under the supervision of the forest service. This term includes all trails and all roads not comprised within the definition of major project.

Regulation 2—Apportionment

SECTION 1. From such information, investigation and sources as the forester shall deem most accurate he shall prepare a tabulation showing the areas and value of the national forest land in each state, including the value of forage and timber. This tabulation, if approved by the secretary, shall serve as the basis of apportionment for the forest highway fund.

SEC. 2. The secretary, after considering the recommendations of the forester, will apportion the forest highway fund for expenditure within the state as follows: One-half in the

ratio that the area of national forest land in any state bears to the total area of such land in all states and one-half in the ratio that the value of national forest land in any state bears to the total value of such land in all states.

SEC. 3. The forester shall prepare a tabulation for the distribution of the forest development fund for expenditure within the states based on the relative needs of the various national forests, taking into consideration the existing transportation facilities, the value of timber or other resources served, relative fire danger, and comparative difficulties of road and trail construction. This tabulation, if approved by the secretary, shall constitute the apportionment of this fund for expenditure within the states.

SEC. 4. Ten per cent of the amount apportioned for expenditure within each state from the forest highway fund shall be set aside for allotment for administrative expenses of the bureau and the forest service and for the purchase and maintenance of equipment. The portion of the amounts set aside not required for these purposes will be returned to funds for construction purposes.

SEC. 5. After deduction of the amounts set aside for administration and equipment expenses, the forest highway fund apportioned to the several states shall be available for expenditure on the survey, construction and maintenance of approved projects on the forest highway system.

SEC. 6. The apportionment for expenditure in each state from the forest development fund shall be available for administrative and equipment expenses of both bureaus, for the construction of major projects recommended by the forester and approved by the secretary, and for minor project work as approved by the forester.

Regulation 3—Selection of Forest Highway and Forest Development Road Systems

SECTION 1. Forest roads shall be classified as follows:

(1) Forest highways, comprising the forest highway system.

(2) Forest development roads, comprising the forest development road system.

SEC. 2. Forest highways will include:

(1) All existing and proposed roads, or parts of roads, which are necessary sections or extensions of the federal aid system wholly within the national forests.

(2) Other existing and proposed roads, or parts of roads, which are sections or extensions of the federal aid system and partly within or adjacent to and serving the national forests and which may be designated as forest roads by the forester and the chief of the bureau.

(3) Other existing or proposed forest roads of primary importance to counties or communities.

SEC. 3. Forest development roads shall include all other existing or proposed roads within or adjacent to and serving the national forests and designated as forest roads by the forester. A record of all roads designated as forest development roads will be furnished to the bureau.

SEC. 4. The bureau, acting for the secretary, shall request each state highway department to submit a map of the roads within and adjacent to the national forests which in its judgment should be included in the forest highway system, of primary importance to the state, or to the counties, or communities thereof. Each state highway department shall be requested, before submitting such a plan, to secure and consider recommendations from the proper county road officials as to forest highways of primary importance to the counties and communities. The district engineers of the bureau will file together with their recommendations copies of the map with the district forester.

SEC. 5. Each district forester of the forest service shall prepare for the national forests in each state or portion of state within his district maps showing the existing and proposed roads within, adjoining, and adjacent to the forests classified as to status, type, and function. This plan shall be based upon the primary road system proposed by the state highway department. It shall show in which of the following classes, in the judgment of the district forester, each proposed forest road should be included:

(1) Forest highway system, classified as in section 2, regulation 3.

(2) Forest development road system.

Trails, maintenance work, and minor repairs and construction estimated to cost less than $500 per mile will not be included on such maps.

The plan shall be revised annually in accordance with the above procedure.

SEC. 6. The bureau, acting for the secretary, shall arrange a conference with the state highway department and the forest service for consideration of the forest highway system proposed by the state highway department and the district forester. Following such conference final recommendations for the designation of a forest highway system shall be submitted to the secretary by the chief of the bureau and the forester.

SEC. 7. The forest highway system may be added to or revised by the action of both bureaus, following the procedure herein provided for the original designation of the system.

SEC. 8. The forest development road system shall be added to or revised as the forester shall prescribe.

Regulation 4—Selection of Forest Highway and Forest Development Programs

SECTION 1. The chief of the bureau and the forester shall, following the recommendations from their district representatives, prepare and submit to the secretary a list of the forest highway projects selected for the initial (fiscal years 1922 and 1923) forest highway program. The program shall include provision for the maintenance of roads existing or under construction. This list shall set forth the location, available cooperation, if any, whether major or minor, and the tentative expenditure authorized from the forest highway and other available forest-road funds. Upon the approval of such projects, or any of them, by the secretary, they shall be included in the forest highway program.

SEC. 2. Subsequent projects to be incorporated in the forest highway program shall be selected as follows: All projects proposed by counties, communities, or other agencies shall be submitted to the state highway department. The bureau, acting for the secretary, shall request each state highway department to submit a list of proposed projects, including its recommendations on all projects submitted to it by counties or other agencies. All projects shall be submitted as far as practicable on forms furnished by the secretary.

SEC. 3. The recommendations of the bureau on all projects received from the state highway department shall be furnished to the district forester and the state highway department. The district forester shall investigate any proposed projects coming within the requirements of the forest highway fund, including those submitted by county authorities, communities, or other agencies to the state highway department. The district forester shall call upon the district engineer of the bureau for any necessary engineering investigations to supply accurate and full information with reference to proposed state or county projects. The district engineer shall arrange for joint conferences with the state highway department and the district forester for final consideration of the program. A joint report shall be filed with the forester and the chief of the bureau, together with such additional recommendations as their respective representatives may wish to make, following which the forester and the chief of the bureau will submit a program of recommended forest-highway projects to the secretary for approval, classified as major and minor. The forest highway program may be added to and modified from time to time, following the same procedure. The program shall include provision for the maintenance of roads existing or under construction.

SEC. 4. The selection of forest highways for improvement or construction shall include only those which qualify under section 2, regulation 3.

SEC. 5. The forest highway program shall be based upon the following considerations:

(1) Construction correlation with adjacent federal and state road programs.

(2) The interests of communities within, adjoining, or adjacent to the national forests.

(3) Service to the national forests by increasing their value and usefulness.

(4) The economy of continuity of operations.

(5) Benefit to forest development, protection, and administration.

(6) Amount of available cooperative funds.

SEC. 6. The district forester shall prepare and submit for approval by the forester and secretary a list of forest-development roads which constitute major projects. This list shall set forth location, available cooperation if any, and authorized expenditure from the forest development or other available funds. Upon the approval of such projects, or any of them, by the secretary, they shall be included in the forest development program. The selection of forest development roads and trails constituting minor projects shall rest with the forester.

Regulation 5—Cooperative Agreements

SECTION 1. Cooperation from the state highway department, county authorities, or other agencies, associations, or individuals shall not be required but may be accepted.

Cooperative agreements shall be entered into for all projects which involve financial contributions to surveys, construction, or maintenance by the state highway departments or county authorities, and shall be approved prior to beginning survey or construction as the case may be.

SEC. 2. Negotiations for cooperative agreements for approved forest highway projects of the first two classes under section 2, regulation 3, shall be conducted by the bureau, following an agreement with the forest service as to financial cooperation, if any, and maintenance. The detailed provisions of the agreements shall be those agreed upon by the bureau and the state highway department. All agreements for con-

struction shall be based upon location survey estimates and shall be prepared on forms furnished by the secretary for execution by the secretary and the state highway department.

SEC. 3. Negotiations for cooperative agreements for other forest road projects shall be conducted by the forest service, after consultation with the bureau as to their technical and financial features. The detailed provisions of the agreement shall be those agreed upon by the forest service and the cooperating agency. All such agreements for the construction of major projects shall be based upon survey estimates prepared by the bureau and shall be prepared for execution by the secretary and the cooperating agency. Agreements for minor projects shall be executed by the forester or district forester of the forest service and the cooperating agency.

Regulation 6—Surveys, Construction, and Maintenance

SECTION 1. The survey and construction of minor projects included in the forest highway and forest development programs shall proceed under the direction of the forest service. On roads that may ultimately be improved to constitute part of an important public highway, a reconnaissance survey shall be made by the bureau, and all construction shall follow the location so determined as closely as practicable.

SEC. 2. A location survey and estimate of cost of major projects included in the forest highway and forest development programs, under allotments set up as provided in regulation 7, shall be made by the bureau as soon as practicable.

SEC. 3. Construction work on any major project included in the forest highway or forest development program shall not be authorized or undertaken until a location survey and cost estimate satisfactory to the bureau has been made by the bureau, unless specifically agreed upon by the forester and the chief of the bureau.

SEC. 4. Upon the completion of such survey and cost estimate, the construction of a designated project, conforming with the original project or forming a part thereof, at a designated cost not exceeding by more than 25 per cent the

expenditure authorized in the forest highway or forest development program, may be authorized by joint agreement of the chief of the bureau and the forester. Construction projects substantially deviating from the project as approved in the forest highway or forest development programs or which exceed by more than 25 per cent the expenditure authorized therein shall be submitted by the chief of the bureau and the forester to the secretary for approval.

SEC. 5. Following the authorization of any major construction project as provided in this regulation, the bureau shall proceed with its construction under an allotment set up as provided in regulation 7.

SEC. 6. The construction of projects on all national forest highways of classes 1 and 2 of regulation 3, section 2, shall be in accordance with plans and specifications prepared under the direction of the bureau. Such construction shall not be started until the plans and specifications have been approved by the bureau and by the state highway department, and until the district forester has had opportunity to examine the location map or surveyed line and to indicate any details of location desirable for the protection or development of the national forests.

The construction of all other major projects under the direction of the bureau shall be in accordance with the plans and specifications prepared by the bureau and approved by the forest service and each cooperating agency.

SEC. 7. The construction of minor projects shall be in accordance with the specifications approved by the forest service and such cooperating agency as may be involved.

SEC. 8. Construction work on national forest highways of classes 1 and 2 of regulation 3, section 2, shall not be considered complete until the project has been inspected and approved by the bureau and the state highway department, nor until the district forester has approved the clearing and disposal of refuse. No other construction work on major projects shall be accepted as complete by the bureau until it has been inspected and approved by the district forester and the cooperator.

SEC. 9. Maintenance work on all forest highways shall be performed by the bureau unless otherwise specified by agreement. The maintenance of all other road and trail projects shall be performed by the forest service unless otherwise provided by cooperative agreement.

Regulation 7—Records and Accounting

SECTION 1. Following the approval of the initial forest highway program for any state and of any subsequent projects or group of projects included therein, a lump sum allotment shall be set up by the forest service with the district fiscal agent of the forest service for disbursement on vouchers approved by authorized officers of the bureau covering:

(1) The authorized expenditures of all approved major projects.

(2) The current cost of maintenance on all projects to be maintained by the bureau, as estimated by the bureau.

(3)* From the administrative and equipment fund provided for by regulation 2, section 4, an amount for administrative expenses and equipment equal to 10 per cent of the sum of Nos. 1 and 2.

Such allotments shall be drawn from any available road appropriation applicable under existing law and regulation of the secretary to the projects concerned. Upon agreement between the chief of bureau and the forester to authorize construction of a project, as provided in section 4 of regulation 6, necessary additions to or deductions from the allotment previously set up shall be made. The bureau is authorized to make transfers between construction project allotments not exceeding 10 per cent of any allotment so reduced or increased. Transfers of more than 10 per cent may be made with the concurrence of the forest service. Any unused balances under such allotment shall be made available for subsequent program work.

SEC. 2. Following the approval of the forest development road program for any state or subsequent development projects in that state, a similar allotment covering major projects so

approved shall be set up for disbursement on vouchers approved by the bureau, and a similar procedure followed in subsequent adjustments or transfers.

SEC. 3.* Corresponding allotments shall be set up by the forest service with the district fiscal agents of the service covering approved minor projects and the expenditures of the forest service for administration and maintenance. One per cent of each forest highway apportionment shall be similarly set up for administrative expenses of the forest service.

SEC. 4. The forester shall be responsible for maintaining an accurate fiscal record of the status of all appropriations for national forest roads and all expenditures and allotments thereunder for administration, equipment, surveys, construction, and maintenance.

SEC. 5. As soon as practicable after the end of each fiscal year the forest service shall prepare a report to the secretary showing the work accomplished in each state on forest development roads and the disbursements made therefor. For the purpose of this report the bureau shall furnish to the forest service information regarding the work accomplished on any forest development roads under the direction of the bureau. The bureau shall also furnish to the forest service a copy of each monthly statement exhibiting the progress of all its construction and the financial status of each project.

As soon as practicable after the end of each fiscal year the bureau shall also report to the secretary the work done on national forest highways in each state and the disbursements made therefor.

SEC. 6. Cooperative funds deposited in the United States treasury shall be placed in the appropriation "cooperative work, forest service," authorized by act of congress of June 30, 1914 (38 Stat. 415, 430), and shall be audited, disbursed, and recorded in the same manner as funds under the act. Cooperative funds not deposited in the treasury shall be audited and disbursed as provided in the cooperative agreement.

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*As amended April 1, 1928.

SEC. 7. The bureau shall keep all records which it deems necessary of survey, construction, and maintenance costs on major projects supervised by it. The bureau shall furnish the forest service with a final report showing the accomplishments and expenditures on each project constructed by it, and on the projects constructed under a cooperative agreement a copy of the report will be furnished by the bureau to the cooperating agency.